LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 1, 2019

As Spring makes its entrance, a newly-seated Local Government Commission is preparing for another legislative session, which should bring some legislative changes for municipalities as well as some important decisional law. In the meantime, we have prepared some cases for your review from the last quarter of 2018. These include important decisions on the powers of elected auditors, tort immunity, and occupational diseases. We have also included some recently-introduced local government bills to watch.

-Phil Klotz, Executive Director of the Local Government Commission

Legislative Updates:

HB 407, PN 878. Amends Title 1 (General Provisions) of the Consolidated Statutes to create a uniform definition of "blighted property." HB 407 was passed by the House.

SB 317, PN 296. Amends the Second Class Township Code to reduce the time required between the readvertisement and adoption of the budget from 20 days to 10 days. Currently, the Code requires that upon any revision of the proposed budget, if the estimated revenues or expenses in the final budget are increased more than 10 percent in the aggregate or more than 25 percent in any major category over the proposed budget, it must be readvertised once before adoption and an opportunity given to taxpayers to examine the amended proposed budget. SB 317 was referred to the Senate Local Government Committee.

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Auditors

Watts Township Board of Auditors v. Raudensky, 2018 WL 6542469 (Pa. Cmwlth., December 13, 2018). Township Board of Auditors filed a report with the trial court imposing a surcharge on township supervisor, presumably pursuant to inherent power of the auditors under the Second Class Township Code. The supervisor challenged the authority of the Board to impose the surcharge and the trial court agreed. Commonwealth Court affirmed. The Township-appointed accountant performed an audit in 2015 and the Board filed their surcharge in May of 2016. The Board requested the accountant to review the expenditure and the accountant refused. Commonwealth Court held that the power of surcharge stems only from an audit, and a board of auditors in a township of the second class divested of authority to undertake an audit is also divested of the power to impose a surcharge.

Assessment law

In re Consolidated Appeals of Chester-Upland School District, 2018 WL 6797482 (Pa. Cmwlth., December 27, 2018). Trial Court ruled that Appellants may not consider the presence of an outdoor advertising sign on a property when determining its fair market value for the purposes of a real estate tax assessment. Commonwealth Court vacated the order and remanded. Appellants argued before the Trial Court that the assessments of property should be increased in order to account for revenue that the property owners realized through leases or easements to outdoor advertising companies that erected and operated a billboard on the property. The trial court held that "a taxing authority may NOT use the presence or existence of an outdoor advertising sign thereon to increase a property's real estate tax basis or assessment based upon a claim of increased fair market value determined by the cost, income, comparable sales and/or any other valuation approach." Appellants asserted that that the sign exemption, 53 Pa. C.S. §8811(b)(4), only exempts the signs and sign structures and not the land underneath the

signs, which may be assessed based on income derived from leases or easements. Commonwealth Court agreed, concluding that "a property's suitability to a billboard use and income earned by the property owner from the rental of the property to a billboard operator are not excluded from a fair market valuation by Section 8811(b)(4) and that the property should be valued consistent with the general principles of valuation…."

Authorities

Bucks County Services, Inc. v. Philadelphia Parking Authority, 195 A.3d 218 (Pa., October 17, 2018). The Parking Authority (PPA) and the Public Utility Commission (PUC) appealed an order of the Commonwealth Court invalidating a jurisdictional agreement between PPA and PUC and concluding certain PPA regulations were invalid and unenforceable. Appellees, "partial authority" taxicab service providers, were subject to dual jurisdiction between the PPA and the PUC for certain services. PUC ceded jurisdiction over Appellees pursuant to the agreement. The Pennsylvania Supreme Court affirmed in part and reversed in part. Reversing the Commonwealth Court's determination that the agreement violated Appellees' substantive due process rights, the Court held that the agreement itself did not expand the powers of the PPA and did not unduly burden Appellees' right to provide service. The Court affirmed Commonwealth Court's determination that the regulations made applicable to Appellees as a result of the agreement were unreasonable; uniform application of regulations to both "partial authority" providers and medallion providers, when material difference in services was manifest, constituted an arbitrary exercise of PPA's authority, unduly burdened the financial well-being of Appellees, and frustrated the intent of the law to provide more, not less taxicab service in the city.

Civil Rights

Press and Journal, Inc. v. Borough of Middletown, 2018 WL 6567824 (M.D., Pa., December 13, 2018). Plaintiff newspaper publisher advertised notices and public events for the Borough "for over 100 years." After the Borough abruptly terminated advertising with the plaintiff, inquiries were made. The Borough responded with a letter specifying that the decision was made in response to articles and editorials that were critical of the Borough. Furthermore, the Borough stated that "[s]hould the Press and Journal demonstrate reliability to professionally and responsibly report on actions and statements of Borough Council and Management, as well critiquing us from a founded and balanced position, we will be happy to patron your newspaper again." At a subsequent meeting, Plainitff's counsel read a letter asking Borough to reverse course and opining that the action was an unconstitutional infringement of Plaintiff's First Amendment rights. Upon presentation of the letter, "the mayor purportedly 'ripped [it]... in half and threw the pieces on the Council table.'" Plaintiff's filed a claim for injunctive relief under 42 U.S.C. § 1983 accusing Borough of various First Amendment violations. The Borough moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b), claiming lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The district court denied the motion. Despite Borough's arguments to the contrary, an "independent contractor" with a "pre-existing commercial relationship" having reason to believe the relationship would continue despite the lack of a contract, sufficiently asserts a claim of specified First Amendment violations based on political views for actions adverse to that relationship.

Employee Relations

Berks-Lehigh Regional Police Officers Association v. Upper Macungie Township, 2018 WL 5020649 (Pa. Cmwlth., October 17, 2018)(UNREPORTED; *See* 210 Pa. Code § 69.414). Association was awarded damages by trial court in breach of contract claim against Appellant Township. Township abandoned membership in regional police department leading to the dissolution of the organization and loss of specified compensation and benefits for Association members under the collective bargaining agreement (CBA) with the regional department, compensation and benefits, which would have otherwise been earned through the term of the CBA. Commonwealth Court reversed. The CBA provided no guaranteed employment of Association members. The "duration of agreement" provision of the CBA only specified the time period during which certain terms and conditions applied. Furthermore, Commonwealth

Court reversed the award of attorney fees to other municipal participants in the department and subsequent litigation; fees that were argued as appropriate given Township's instigation of the dissolution of the dissolution. Commonwealth Court held that to award fees for an option the Township was permitted by agreement to exercise was inappropriate.

Southerton v. Borough of Honesdale, 2018 WL 5810269, (M.D.Pa. Nov. 6, 2018). Police chief asserted that the borough, mayor and council members retaliated against him due to his testimony during a subordinate's grievance arbitration and his statements to the press about a policy he disagreed with. Chief also asserted a failure to pay overtime in violation of the Fair Labor Standards Act (FLSA) and retaliation in violation of the Petition Clause of the First Amendment. Under precedent, if a public employee testifies in *court*, the employee speaks as a citizen, but if the public employee testifies elsewhere, such as a grievance arbitration, the court must independently consider if the testimony falls within the employee's ordinary job duties. If so, then First Amendment does not protect the speech. The court noted that the distinction protects the integrity of the judicial process. Judicial proceedings involve public interests but grievance arbitrations involve private interests. Like the free speech clause, a public employee's lawsuit can be protected under the First Amendment's petition clause. Under either clause, a suit is protected if it involves a matter of public concern which depends on the content, form and context of the petition within the whole record. The police chief asserted the defendants retaliated against him for filing the lawsuit by failing to pay him, provide benefits or correct his pay, although all other officers had their pay corrected. The court denied this count of motion for summary judgment, stating that the suit does involve a matter of public concern since the allegations go beyond merely personal grievances and indicate a systemic problem interfering with a public agency's performance of its governmental functions.

Mount Lemmon Fire District v. Guido, 139 S.Ct. 22 (Nov. 6, 2018). Fire District, a political subdivision in Arizona, laid off its two most senior full-time firefighters due to budget constraints. The firefighters filed suit alleging that their termination violated the Age Discrimination in Employment Act of 1967 (ADEA). In response, Fire District asserted that the District was too small to qualify as an "employer" as defined in section 630(b) of the ADEA. Section 630(b) reads: "*The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employee…. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State*…." The Court, affirming the judgment of the Court of Appeals for the Ninth Circuit, held that ADEA applies to states and their political subdivisions regardless of the number of employees because the phrase "also means" adds new categories of employers within the reach of ADEA. Statutory language pairs states and their political subdivisions with agents, a discrete category that carries no numerical limitation. ADEA is similar to the Fair Labor Standards Act which also provides that an employer includes states and political subdivisions regardless of the number of employees.

Eminent Domain

Gabrys v. Pocono Mountains Municipal Airport Authority, 2018 WL 4956871 (Pa. Cmwlth., October 15, 2018)(UNREPORTED; *See* 210 Pa. Code § 69.414). Appellees petitioned for a de facto taking under Section 502(c) of the Eminent Domain Code after Authority expanded runways and caused significant disruption in the use and enjoyment of the property. The trial court overruled Authority's preliminary objections to the petition for the appointment of viewers and the Commonwealth Court affirmed. Sufficient evidence deemed credible by the trial court existed to establish a prima facie case that a de facto taking had occurred. Finally, the trial court adequately determined that a condemnation of an air easement over, rather than the fee to, the property occurred, and the extent to which the condemnation interfered with the fee is a matter for the board of viewers to determine in the context of damages.

Fireworks

Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205 (Pa.Cmlth. Dec. 4, 2018). At issue in this constitutional challenge was the addition of Article XXIV to the Tax Reform Code by Act 43 of 2017, which relocated and modified the provisions of the Fireworks

Law. The new article authorized the expansion of permissible fireworks sales to consumers, imposed a 12% tax (including the 6% sales tax) on those sales and permitted peak season sales of fireworks in tents and other temporary structures. A challenge to Act 43 was filed by several fireworks companies with brick and mortar stores. The court granted summary relief to a challenge that the provisions relating to temporary structures violated Article II, Section 1 of the Pennsylvania Constitution as an impermissible delegation of legislative authority by the General Assembly. The definition of "temporary structure" included structures meeting the specifications of "The National Fire Protection Association Standard 1124, 2006 edition, *or any subsequent edition*" (NFIP 1124). The General Assembly delegated its authority to the NFPA without any safeguards that would conform the delegation to constitutional requirements. The General Assembly provided no policy statement or other limiting parameters, leaving the NFPA free to create, alter or remove at any time or at no time, any standard it chooses regarding temporary structures for selling fireworks. Without statutory controls, NFPA drafters would be open to influence by trade groups or others whose interests may or may not coincide with the interests of electors, with no requirement to hold hearings, accept public comments or explain its grounds for safety standards. The court did conclude that the language relating to temporary structures is severable from the other provisions of Act 43.

Federal Crimes

United States v. Baroni, 909 F.3d 550 (3rd Cir., November 27, 2018). Defendant port authority deputy director and deputy chief of staff for New Jersey Department of Intergovernmental Affairs, among others, engaged in a scheme to impose gridlock on borough to punish mayor for failing to endorse governor for reelection. To effectuate the scheme, defendants concocted a "traffic study" to restrict toll lanes historically available to borough on the George Washington Bridge. The "study" resulted in the payment of overtime to toll operators and other related payroll costs for assembling data. The effort resulted in extensive media coverage and came to be known as "Bridgegate." Defendants were charged with "conspiracy to obtain by fraud, knowingly convert, or intentionally misapply property of an organization receiving federal benefits, 18 U.S.C. § 371, and the substantive offense, *id.* § 666(a)(1)(A); conspiracy to commit wire fraud, *id.* § 1349, and two counts of the substantive offense, *id.* § 1343; and conspiracy against civil rights, *id.* § 241, and the substantive offense, id. § 242." A jury convicted Defendants on all counts. The Third Circuit affirmed in part and reversed in part. The court upheld the wire fraud and substantive offenses: evidence was sufficient to satisfy elements of crime given that Defendants used email to perpetrate a fraud on the port authority and deprived it of property in the form of, at least, unnecessary payroll expenses. Furthermore, the court rejected defense arguments that defendant deputy director had unbridled authority to restrict lanes and the case represented an "impermissible honest services fraud case," and other arguments based on a lack of criminal conduct, jury instructions and jurisdictional thresholds. The court reversed on the issue of the civil rights crimes based on qualified immunity precedent, holding that a localized "right to intrastate travel" has not been sufficiently established as a substantive right.

Government Immunity

Brewington for Brewington v. City of Philadelphia, 199 A.3d 348 (Pa., December 28, 2018). Parents of nine-year-old student sued school after he collided with unpadded concrete wall during a relay race in gym class. The student suffered a concussion, was "absent from school for one to two months after the incident, and continued experiencing headaches and memory problems years later." Mother alleged that student's injuries occurred because of the negligence of the school in failing to pad the gym wall, which she alleged was a defective and dangerous condition of the premises. In response, the School filed, *inter alia*, a motion for summary judgment, raising the defense of governmental immunity, and claiming that the real property exception to governmental immunity under the provisions of Title 42, Chapter 85, subchapter C (relating to governmental immunity) did not apply. The trial court granted summary judgment to the school, noting that the safety mats are personalty, and that the concrete wall without the pads constituted a "negligent design" of the gym facility.

Commonwealth Court reversed and the Pennsylvania Supreme Court affirmed. The Court held that although the mats are personalty, the unpadded walls were the real property which caused the injury, and the real property exception to tort immunity applies where there is a failure to provide safety features where a duty otherwise exists. Furthermore, the fact that the gym teacher may have negligently managed the children by having them run towards a wall does not preclude the real property claim.

Land Use

Frederick v. Allegheny Township Zoning Hearing Board, 196 A.3d 677 (Pa. Cmwlth., October 26, 2018). Objectors appealed from trial court order affirming zoning hearing board decision denial of their land use appeal. Specifically, Objectors challenged zoning ordinance permitting oil and gas well operations in all zoning districts provided public safety conditions were satisfied. Objectors alleged the ordinance codified spot zoning "in violation of substantive due process" and was inconsistent with the Environmental Rights Amendment (ERA) in Article I, Section 27 of the Pennsylvania Constitution and several provisions of the Pennsylvania Municipalities Planning Code (MPC). Commonwealth Court affirmed. Permitting well operations in all zoning districts was, by definition, not spot zoning. Furthermore, the ordinance did not violate substantive due process; the township made a deliberate evaluation of the public interest in determining the scope of the use and no credible evidence was introduced to rebut the presumption that the ordinance was a legitimate exercise of police power. The court also dismissed the argument that the ordinance violated the ERA, holding that the ordinance did not "unreasonably impair" rights under the ERA and that the amendment imposes no duty on municipalities to enact "specific affirmative measures" to protect the environment. Finally, the court held that insufficient evidence existed to find that specific provisions of the MPC were violated.

Hoefling v. Zoning Hearing Board of Monroe Township and Monroe Township, 2018 WL 5290348 (Pa. Cmwlth., October 25, 2018)(UNREPORTED; *See* 210 Pa. Code § 69.41). Trial court affirmed a decision of Township zoning hearing board (ZHB) denying appellants' appeal of an enforcement notice issued by Township zoning officer which required them to cease and desist renting out their entire home on a short-term basis through websites such as VRBO (Vacation Rentals by Owner). Appellants did not visit the property while it is rented, but would stay there approximately one or two weekends per month and on holidays when the Property was not being rented. The notice was issued after a complaint from a neighbor of "bonfires, unruly off-leash dogs, drunkenness, rudeness, renters knocking on his door and walking into his garage at night and as many as 30 cars parked on the street…." Commonwealth Court reversed. The ordinance restricted the applicable zone to include "single-family detached dwellings" and defined dwellings as excluding "hospitals, hotels, boarding, rooming and lodging houses,

Section 3302 of the Oil and Gas Act specifically states that a municipality lacks the power to regulate how gas wells operate. Section 3302 provides that "local ordinances purporting to regulate oil and gas operating regulated by Chapter 32 (relating to development) are hereby superseded. No local ordinance adopted pursuant to the MPC or the Flood Plain Management Act shall contain provisions that impose conditions, requirements or limitations" on oil and gas operations regulated by the Oil and Gas Act. . . . Although the last sentence of Section 3302 has been declared unconstitutional, this preemption language was left intact.

In sum, a municipality may use its zoning powers only to regulate where mineral extraction takes place. . . . A municipality does not regulate how the gas drilling will be done. Objectors' complaints about the purported harm to the environment from the operations of the . . . project should have been addressed to the state agencies that issued [Appellee] its operating permits.

- *Frederick v. Allegheny Twp. Zoning Hearing Bd.*

institutional houses, tourists, courts and the like, offering overnight accommodations for guests or patients." Although a ZHB is entitled to great deference in the interpretation of a zoning ordinance, the court held the excluded uses as implying the renting of a portion of a property. Because the ordinance did not prohibit the short-term rental of an entire property and an owner is entitled to a favorable interpretation of ambiguous meanings within a zoning ordinance, the order of the trial court was reversed.

Tax Claims

In re Adams County Tax Claim Bureau, 2018 WL 6542421 (Pa. Cmwlth., December 13, 2018). Appellant Profit Sharing Plan acquired title to property after it was unsuccessfully exposed to upset sale. Bureau petitioned the court for a judicial sale and served both prior record owners and Plan with notice of the Rule to Show Cause. Plan did not respond to the Rule, and a judicial sale of the property was undertaken. Plan filed a petition to set aside the sale and the trial court denied it, finding that Plan had received personal notice of the Rule. The trial court did not analyze the sufficiency of the judicial sale advertisement. Commonwealth Court reversed, holding that the advertisement for the judicial sale did not contain a "reference to the prior advertisement" as is strictly required by Section 612(b) of the Real Estate Tax Sale Law.

Workers Compensation

City of Philadelphia Fire Department v. Workers' Compensation Appeal Board (Sladek), 195 A.3d 197 (Pa., October 17, 2018). City firefighter brought workers' compensation claim following diagnosis for malignant melanoma. Workers' compensation judge and appeals board held that firefighter was entitled to statutory presumption of compensability by establishing that he had cancer and was exposed to Group 1 carcinogens during the course of employment. Furthermore, evidence offered by City challenging method of general causation was rejected as refuting the presumption because it did not specifically address the disease of the claimant. Commonwealth Court vacated and remanded, holding that firefighter failed to meet his burden that cancer was actually caused by specific Group 1 carcinogen exposure, and that it was error for the judge to disregard City testimony on method of offering a general causation opinion. In a decision with four opinions, the Pennsylvania Supreme Court reversed and remanded. A majority of the Court held that a claimant satisfies the statutory presumption of compensability by establishing cancer of a type that could *possibly* be caused by Group 1 carcinogen, and, if established, the presumption may not be overcome with evidence challenging general causation methodology. On remand, the Court instructed that evidence attacking methodology used to establish the presumption may be weighed at that stage, but if the presumption is established, the City must prove that the cancer from which claimant suffers was not caused by his firefighting occupation.

Legislative Updates:

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SB 82, PN 61: Amends the Local Tax Collection Law to provide third class counties, and municipalities and school districts in third class counties, more flexibility to utilize reliable, efficient alternatives for property tax collection. Municipalities and school districts in third class counties may continue to utilize the services of their local tax collector, or alternatively, have the county treasurer collect property taxes. SB 82 was referred to the Senate Finance Committee.

HB 793, PN 873. Amends the Local Tax Collection Law to authorize a municipality, by ordinance, to enter into an optional tax collection agreement with a tax officer named by the municipality who shall be responsible for the continued collection of all taxes previously collected by the tax collector. The alternative tax collector must be one of the following: (1) a tax bureau; (2) the county treasurer; (3) the tax collector of the adjoining or conveniently located taxing district; (4) a private agency already defined as a tax officer under the Local Tax Enabling Act; or (6) a public employee of the municipality. HB 793 was referred to the House Finance Committee.