LOCAL GOVERNMENT COMMISSION
Quarterly Legal Update

Issue 1, 2020

Our first case law publication of 2020 contains some interesting decisions on municipal claims, municipal services, and Right-to-Know. Also of note were opinions involving employment retaliation and easements, with implications beyond municipal law. The legislative update includes two municipal code bills sponsored by the Local Government Commission, and legislation addressing private road maintenance and public notice of utility facility sales.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

HB 406, PN 2831: Amends Title 53 of the Pennsylvania Consolidated Statutes to require municipalities to host at least one public meeting to discuss the potential sale or lease of a sewer or water system. Passed House unanimously on February 4, 2020, and was referred to the Senate Consumer Protection and Professional Licensure Committee on February 19, 2020.

SB 1039, PN 1544: Incorporates Act 154 of 2018, the reenactment and amendment of the County Code, into Title 16 of the Pennsylvania Consolidated Statutes and establishes a configuration of Title 16 to accommodate future consolidation of free-standing law for all classes of counties. This bill, sponsored by the Local Government Commission, was referred to the Senate Local Government Committee on February 19, 2020.

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Civil Rights

Javitz v. County of Luzerne, 940 F.3d 858 (3rd Cir., October 10, 2019). Appellant former county human resources director brought federal civil rights claim against county for her termination after Appellant reported criminal wiretap by employee union representative. Trial and appeals courts rejected appellant's first contention that she was denied 14th Amendment due process because she was an at-will employee and could not claim a property right in her employment. The trial court also rejected her second contention – that she was retaliated against for engaging in constitutionally protected speech by reporting the crime – because it found that the speech related to her official duties and was thus, not constitutionally protected. On appeal the court reversed and held that, although related out as a citizen concerned with the commission of a crime and not as a part of the ordinary scope of her duties.

Bruni v. City of Pittsburgh, 941 F.3d 73 (3rd Cir., Oct. 18, 2019). Appellants contested that an ordinance prohibiting congregating, patrolling, picketing and demonstrating activities within a specified area outside of a clinic that provided abortion services was facially unconstitutional under the Supreme Court's precedent in *Reed v. Town of Gilbert* (summarized in the LOCAL GOVERNMENT COMMISSION QUARTERLY LEGAL UPDATE, Summer Issue, 2016, p. 1) where it was applied to prohibit one-on-one counseling or conversations related to the services provided by the facility as not content neutral, because other topics of conversation would not be prohibited. By applying the doctrine of constitutional avoidance, the court found that one-on-one conversations would not constitute a violation of the ordinance which is otherwise narrowly tailored to serve a significant government interest, and thus not facially unconstitutional.

Tryko Holdings, LLC v. City of Harrisburg, 2019 WL 6839815 (M.D. Pa., Dec. 16, 2019). Sale of incinerator and subsequent administration of waste hauling and billing by City per plan approved by Commonwealth Court, to the exclusion of private haulers, was challenged by owner of multi-family apartment buildings. Under new City billing, Owner's

costs rose "340% per month for assertedly-identical services." Owner alleged Commerce Clause and Equal Protection claims, and declaratory judgment that City's rates were unreasonable in violation of municipal code. City's motion to dismiss the complaint was granted. Because new policy did not distinguish between in-state and out-of-state private haulers, Owner failed to assert a colorable dormant Commerce Clause violation. Furthermore, the City's classification of types of property ownership authorized to use private haulers was subject to rational basis analysis and Owner did not preclude "every conceivable basis which might support [the classification.]" Because only the state law claim remained, the court refused supplemental jurisdiction and did not adjudicate the declaratory judgment count, instead dismissing the complaint in its entirety.

[O]ur threshold inquiry is whether Javitz spoke as a citizen or a public employee, and as such, whether her speech was either "ordinarily within the scope of [her] duties," or simply relating to those duties. Who Javitz spoke to, what she spoke about, and why she spoke at all each fall outside the scope of her primary job duties and evidence citizen speech. ... Javitz was allegedly the victim of a crime, which she reported. The crime, subsequent contact with local authority figures regarding that crime, and the lack of any formal duty to report that crime are evidence that she was not experiencing or acting within the primary functions of her employment. Thus, we hold that Javitz's speech was that of a citizen speaking to a matter of public concern.

- ***Javitz v. County of Luzerne at 865-867. (citations omitted)***

Burford v. Delaware County, Pennsylvania, 2019 WL 7048796 (E.D. Pa., Dec. 20, 2019). Plaintiff state criminal defendant who was found not guilty, brought suit alleging that retention of bail money to support court costs violated his Fifth, Eighth, and Fourteenth Amendment rights. Plaintiff sought to represent the interests of other state criminal defendants who were similarly found not guilty and who had bail money unlawfully retained. The defendants included the Prothonotary/Clerk of Court, the Director of Court Financial Services, and the Director of Pre-Trial/Bail Services. The district court granted in part and denied in part defendants' motion to dismiss. Prothonotary, as an officer of the Pennsylvania judicial system, was entitled to 11th Amendment sovereign immunity in her official capacity, but was still liable personally on state law conversion claim. Because the rights at issue were not clearly established, defendants in their individual capacities enjoyed qualified immunity from constitutional claims. The court denied prothonotary defendant's motion to dismiss on the grounds of "quasi-judicial" immunity, because the record had not yet revealed whether her actions were discretionary or ministerial. Because the retention of bail was putatively an established county policy, plaintiff was entitled to some pre-deprivation due process and, thus, the motion to dismiss the procedural due process claim was denied. Because the conduct at issue did not "shock the conscience," the substantive due process claim was dismissed. With regard to the Fifth and Eighth Amendment claims, the record had not yet been fully developed to determine whether the county, by custom or practice, intended to deprive plaintiff of property or impose an excessive penalty. Similarly, the county's *Monell* municipal liability was still at issue.

Government Accountability

City of Harrisburg v. Prince, 219 A.3d 602 (Pa., Nov. 12, 2019). The Pennsylvania Supreme Court granted allocatur to decide whether a spreadsheet created by the city to show the receipt of funds from donors to the Protect Harrisburg Legal Defense Fund is a financial record under the Right-to-Know Law. City had received a Right-to-Know request for the names, addresses and amounts of any donations to or receipts by the city for fund that the city created to defray legal costs associated with defending challenges to local firearms ordinances. City provided the requestor with a redacted donor list. While records that disclose the identities of individual donors are generally exempted from public access under section 708(b)(13) of the RTKL, if those records may be cate-

gorized as financial records, public access is statutorily required. The Pennsylvania Supreme Court reversed the Commonwealth Court's holding that the donor spreadsheet was not a financial record, and therefore remanded for the performance of a balancing test to determine whether any of the donors' personal information may be protected from access under Article I, Section 1 of the Pennsylvania Constitution.

Land Use

Smith v. Scott Township, 2019 WL 5061473 (Pa.Cmwlth., Oct. 9, 2019)(UNREPORTED; *See* 210 Pa.Code § 69.414). Appellant landowners contested that the township and its agents failed to adhere to the provisions of the township's Subdivision and Land Development Ordinance (SALDO) by declining to require that a private road, which was extended by a developer pursuant to the division of the parent parcel, become a public road, and sought mandamus against the township as a remedy. In its analysis of the SALDO, the court noted that the SALDO requires that its provisions be enforced. It provides that in doing so, the township "may institute and maintain appropriate actions" and does not charge any official with a duty to enforce. While highlighting other adequate remedies available to the Appellants the Court held that the ordinance, by its terms, kept enforcement responsibility with the board of supervisors, who have discretion, and thus there is no non-discretionary ministerial duty which could be enforced by mandamus.

Bartkowski v. Ramondo, 219 A.3d 1083 (Pa., Oct. 31, 2019). At issue was whether a landowner must prove impossibility of alternative access arising from zoning and regulatory prohibitions or conditions of the land in order to establish an easement by necessity. Two adjoining "flag" lots were at one time both owned by a common grantor. Eventually each lot was owned by separate owners. The owners of "flag lot 1" constructed their driveway partly across the adjoining flag pole on "flag lot 2" due to physical impediments, including a stream, flood plain, steep slope and utility pole that precluded the placement of the driveway entirely on their pole. When the flag lot 1 owners executed mortgages, the legal description did not include the portion of their driveway that was located on the adjoining flag pole. Eventually, the owners of each flag lot filed claims and counterclaims against each other.

The trial court found the owners of flag lot 1 had not obtained an easement by necessity although it did find for an easement by implication. The trial court explained an easement by necessity is always of strict necessity and never exists as a mere matter of convenience and that although relocation of the driveway may be difficult, there was no demonstration of impossibility and thus necessity. The Superior Court held that the trial court did not err in denying the claim for an easement by necessity.

The owners of flag lot 2 maintained on appeal to the Pennsylvania Supreme Court that the other owners waived their claim of necessity since they failed to cite or discuss the regulations and ordinances that prohibited them from constructing a driveway on their own pole. The Supreme Court determined that by equating strict necessity with impossibility of alternative access, the lower courts increased the flag lot 1 owners' burden beyond what the court previously required. Such a burden would be insurmountable and thus unworkable.

Each case will require individualized consideration of multiple factors, including, but not limited to: the existence of zoning restrictions and the likelihood that the party can obtain the necessary variances or exceptions; the existence of state or federal regulations that prohibit certain uses of the land in question; the topography of the land and the practicability of constructing alternative access; the environmental consequences of construction; the costs involved; and, of course, whether and to what extent these impediments existed at the time of severance. … These considerations are intended only to guide courts in navigating the "gray area" between sheer impossibility and mere convenience.

- ***Bartkowski v. Ramondo***

Determining whether a landowner has established necessity is a fact-intensive question which does not fit a one-size-fits-all, bright-line standard. The central inquiry is whether, absent the recognition of an easement, the proposed dominant estate will be left without a means of ingress and egress, rendering the property inaccessible and thus unusable.

Kalimootoo v. Middle Smithfield Township, 2019 WL 5884598, (Pa.Cmwlth., Nov., 12, 2019)(UNREPORTED; *See* 210 Pa.Code § 69.414). Property owners appealed from an order of the trial court that affirmed a decision of the township zoning hearing board upholding a 2017 enforcement notice relating to various agricultural activities. Property owners asserted that the 2017 action to enforce the 2010 ordinance against them after failing to take further action after a 2001 enforcement action violated their constitutional rights. The Commonwealth Court explained that a claim of selective enforcement must be based on evidence that intentional and purposeful discrimination exists. The court determined that the township did not act with conscious discrimination, i.e., with an arbitrary, irrational or improper motive, in bringing a 2017 enforcement action of various zoning ordinance violations. Property owners' constitutional claims were only conclusory statements unsupported by the record and therefore they failed to establish a violation of their due process rights.

Protect PT v. Penn Township Zoning Hearing Board, 220 A.3d 1174 (Pa.Cmwlth., Nov. 14, 2019). A citizens' group appealed to the trial court after a zoning hearing board denied their challenge on the constitutionality of a zoning ordinance that permitted unconventional natural gas development (UNGD) in the township's low-density residential district. The trial court determined that the zoning ordinance did not violate either the substantive due process rights of the township's residents or their rights under the Environmental Rights Amendment in Article I, Section 27 of the Pennsylvania Constitution. The Commonwealth Court affirmed the trial court's decision and held that there was sufficient evidence to show that UNGD was compatible with the low-density zoning, that the overlay district was consistent with the comprehensive plan and residential land use expectations, that the ordinance protected residents' right to enjoy their property and their right to a healthy environment under the Pennsylvania Constitution, and that the citizens' association failed to establish that the ordinance posed a substantial actual risk to the environment or health of the residents.

425 Property Association of Alpha Chi Rho, Inc. v. State College Borough Zoning Hearing Board, 2019 WL 6765776 (Pa.Cmwlth., Dec. 12, 2019). Landowner was stripped of recognition by Penn State as a fraternity and, consequently, was found to be in violation of zoning ordinance which authorized fraternity house use only as recognized by the University. Landowner argued before zoning board that the property's use as a fraternity began long before the ordinance was adopted, during a time when recognition by the University was not required, and, thus, it should be considered a pre-existing nonconforming use not subject to the ordinance restrictions. Landowner also argued that letters related to University affiliation were hearsay, and that the condition of University recognition was an unlawful delegation of power to Penn State. Landowner appealed the Board's rejection of its arguments and the trial court affirmed the hearsay determination but reversed on the principal substantive issue, holding that the property was subject to a pre-existing non-conforming use. It did not address the unlawful delegation issue. Commonwealth Court affirmed the trial court. On the hearsay issue the letters were admissible in that they were not introduced to prove the lack of University authorization but rather to explain the Borough's course of conduct and their effect on the Borough, and were not central to disputed facts. The property was held to be a lawful nonconforming use. Although the issue of unlawful delegation was not decided, the Commonwealth Court, in a footnote, provided that "were [it] to address the issue" it would conclude that the ordinance unconstitutionally delegated the determination of whether or not the ordinance had been violated to the University.

Municipal and Tax Claims

In re: Petition to Set Aside Tax Sale, 218 A.3d 995 (Pa.Cmwlth., Oct. 1, 2019). Appellant sought to set aside the tax sale of property which occurred while the Appellant was incarcerated on the basis that he was an owner occupant of the property, and the tax claim bureau failed to comply with the notice provisions of the Real Estate Tax Sale Law which apply to an owner occupant. Court rejected tax claim bureau's argument

that it could rely solely on a finding that tax bill was sent to a different address than the subject property to determine whether property was owner occupied. Further in an issue of first impression, the court found that incarceration, like hospitalization, creates a temporary physical impossibility to inhabit a property, but it does not end an owner's occupation of the property, and it does not excuse the tax claim bureau from providing personal service to the owner unless the tax claim bureau petitions the court for a waiver of personal service for good cause.

Philadelphia Gas Works v. Pennsylvania Public Utility Commission, 2019 WL 6690588 (Pa.Cmwlth., Dec. 9, 2019). City gas works (PGW) appealed Commission decisions that once liens securing payment of delinquent gas bills are docketed against real property in county court, the Commission no longer has jurisdiction over late fees of 1.5% per month authorized by tariff and, thus, refunds of years of late fees on charges that were subject to docketed liens, financial penalties on PGW for charging those late fees, and reorganization of PGW billing system were warranted. Commonwealth Court reversed. The Court held that PGW, as a municipally-owned utility, was entitled to cumulative remedies under both the Public Utility Code and the Municipal Claim and Tax Lien Law. Contrary to the PUC argument, the perfection of a municipal lien is not a judgment divesting the Commission of jurisdiction. Consequently, the continued imposition of the late fee following docketing of the lien was authorized.

Taxation and Finance

Punxsutawney Area School District v. Broadwing Timber, LLC, 2019 WL 5561413 (Pa.Cmwlth., Oct. 29, 2019) (UNREPORTED; *See* 210 Pa.Code § 69.414). Real property owner asserted that the school district's use of recent sales prices to determine which properties' tax assessment to appeal created a classification for properties that have recently sold and removes those properties from "uniform treatment." Further, the property owner asserted that the school district created a classification between commercial and residential properties because, due to the lack of formal tax assessment appeal policy, the determination of what appeal to bring is left to the business administrator who has brought only appeals of commercial or commercially-used properties. The Commonwealth Court noted that it does not read the Pennsylvania Supreme Court's recent decision in *Valley Forge Towers Apartments v. Upper Merion Area School District* (163 A.3d 962 (Pa., July 5, 2017) as requiring a formal or written policy or criteria since the holding of that case only requires that selection criteria used by a taxing authority, whether a monetary threshold or other methodology, be implemented without regard to the type of property in question or the residency status of its owner. Here in the instant matter, the district performed a property-by-property analysis to determine if it made financial sense to appeal the assessment and without regard to the property's type or owner. That the district's practice thus far has resulted in appeals of only commercial or commercially-used properties is not determinative. Thus, the school district's practice did not violate the Uniformity Clause and was not inconsistent with the holding in *Valley Forge*.

Legislative Updates:

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HB 2122, PN 3012: Makes various technical changes and clarifications to the Borough Code. The bill also repeals current provisions in the Borough Code regulating the accumulation and collection of garbage and other refuse materials, and creates a new chapter 25B "Solid Waste Collection and Disposition." This bill, sponsored by the Local Government Commission, was referred to the House Local Government Committee on December 10, 2019.

HB 523, PN 2576: Amends the General Road Law to provide for maintenance of a private road when shared by more than one person. Maintenance costs should be shared in proportion to the amount of private road utilized by each person. Passed House (195-1) on January 14, 2020 and was subsequently referred to the Senate Local Government Committee on January 24, 2020.