



LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 1, 2022

Greetings from the Director:

As many of us experience spring fever this month, it can be therapeutic to engage in a bit of light municipal law reading courtesy of the Commission staff. This edition of the Update rounds out interesting cases from the latter part of 2021 including appellate decisions on municipal firearm regulation and First Amendment rights of protesters, as well as cases of first impression governing the application of the FLSA to municipal employees and conflicts of interest in zoning board decisions. Also included is our legislative update which contains several Commission-sponsored bills.

-David Greene, Executive Director of the Local Government Commission

Civil Rights

Marshall v. Amuso, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021).++ Plaintiff school district residents filed action against the school district and sought a preliminary injunction to prohibit the district from enforcing the provisions of the school board’s policies that are the subject of the underlying action, specifically the prohibitions on speech including, but not limited to, “abusive”, “irrelevant”, “offensive”, and “disruptive” comments, and the requirement to state one’s full address prior to making public comment at a board meeting. The court granted the preliminary injunction “[b]ecause the plaintiffs are likely to demonstrate that the challenged policy provisions violated the First Amendment’s prohibition on viewpoint discrimination and because protecting free speech serves the public interest”. In addition to viewpoint discrimination, the court also reinforced precedent, regarding the address announcement requirement, that compelled speech is subject to the same analysis as prohibitions from speaking.

Pomister v. Luzerne Cty. Convention Ctr., 2021 WL 4975081 (M.D. Pa. Oct. 26, 2021). District Court, upon remand from the 3rd Circuit Court of Appeals, reconsidered whether the convention center’s policy sequestering protesters passes muster under the Commonwealth’s Constitution (prior history summarized in the [LOCAL GOVERNMENT COMMISSION QUARTERLY UPDATES](#), Issue 4, 2019, pp. 1-2; [Summer Issue, 2018](#), p.3; and [Summer Issue 2016](#), pp. 1-2). District court held that the policy did not violate protesters’ rights under the Pennsylvania Constitution. Parties agreed that the policies are content-and-viewpoint neutral, and the location is a nonpublic forum. Plaintiff protesters argued that the court should use strict scrutiny rather than intermediate scrutiny in determining the constitutionality of the policy. Relying on the Pennsylvania Supreme Court decision in *Brush v. Pennsylvania State University* (414 A.2d 48 (Pa. 1980)), district court held that the location restriction policy was reasonable under the First Amendment, and therefore passes muster under the Pennsylvania Constitution. The court directed that this case be closed.

Legislative Updates:

SB 673, PN 742 & HB 1351, PN 1466: Introduced by the Local Government Commission, these bills amend the Second Class Township Code to: (1) add language providing that an elected or appointed official of a township may not be surcharged if the official acting in good faith on a written or publicly-disclosed opinion of the township solicitor; and (2) authorize a township to appoint a partnership, limited partnership, association or professional corporation as the township manager. Both bills passed initial chambers unanimously.

Act 96 of 2021 (HB 2071) Amends Title 64 of the Pennsylvania Consolidated Statutes to create the Pennsylvania Broadband Development Authority to coordinate the development and expansion of “high-speed broadband services” to “unserved” and “underserved areas” of the Commonwealth.

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“...requiring the speaker to announce their specific home address is an unreasonable restriction. ...[T]he chilling effect of being forced to announce to all present one’s actual home address before speaking on a hotly-contested issue is clear.”

Marshall v. Amuso

Firearm Owners Against Crime v. Papenfuse, 261 A.3d 467 (Pa. 2021). Firearm rights organization and gun owners (Owners) filed a complaint and declaratory judgment action, challenging, on constitutional and preemption grounds, five of the city’s (City) gun control ordinances which included criminal penalties. The City filed preliminary objections, which the trial court sustained based on Owners’ failure to establish standing to sue. Owners appealed. In a 6-to-1 *en banc* decision, Commonwealth Court affirmed the trial court decision as pertains to one of the ordinances but reversed the trial court decision pertaining to the remaining four ordinances, holding that the Owners had standing to challenge. The Court elaborated that “under a traditional standing analysis, the individual initiating the legal action must show that he is aggrieved by the matter he seeks to challenge”, and that “[t]o be aggrieved, the party must have a substantial, direct and immediate interest in the outcome of the litigation[.]”

The Pennsylvania Supreme Court affirmed, noting that the doctrine of standing “stems from the principle that judicial intervention is appropriate only where the underlying controversy is real and concrete, rather than abstract.” The Supreme Court went on, noting that Pennsylvania courts examine whether the plaintiff’s interest in the outcome is *substantial, direct and immediate*. “A party’s interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection

with the alleged harm; [and] a party’s interest is immediate when the causal connection with the alleged harm is neither remote nor speculative.”

The Supreme Court rejected the City’s contention that Owners’ harm is hypothetical and not immediate because they did not aver that they have been arrested, threatened with citation, or that they changed their behavior to comply with the ordinances.

Given these allegations, which we take as true, Appellees currently must make a choice to either comply with the ordinances, thereby forfeiting what they view as their constitutionally and statutorily protected firearms rights; or violate the ordinances by exercising their rights, thereby risking criminal prosecution. Appellees also have a third option, which is to stop living in, commuting to, or travelling to the City to avoid being subject to its ordinances, which would of course entail relocating from the City, changing employers, or foregoing legislative advocacy. That Appellees are confronted with these options shows that their interest in the outcome of the constitutionality and preemption of the challenged ordinances is substantial, immediate, and direct.

Land Use

Seneca Resources Corp. v. City of St. Marys Zoning Hearing Bd, 2021 WL 5578722 (Pa. Cmwlth. Ct., Nov. 30, 2021).** Appellant natural gas development company contested the validity of the City’s zoning ordinance which established special exception conditions for drilling unconventional gas wells within certain zoning districts in the City, including a condition barring certain facilities within an area of the City exceeding a population density threshold, as determined by the Census. Appellant contested the ordinance on nine grounds – most of which are dismissed by the court with minimal discussion. However, the population density rule was contested as a form of unconstitutional delegation of legislative power by the City’s governing body to the Census to establish a zone

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of exclusion. During adoption, the City failed to provide a map of the excluded zone to the public or regulated community because the regulated zone would be established by the Census map and impacted by future changes to Census data based on changes in the city's population. Thus, the City unconstitutionally delegated its authority to the Census bureau to set its policy under the ordinance, violating Article II, Section I of the Pennsylvania Constitution.

Firearm Owners Against Crime v. Papenfuse, 261 A.3d 467 (Pa. 2021). Objectors to nonprofit property owner's application for variances and special exceptions with respect to plan to maintain retail space, remodel and reopen restaurant, and build dwelling units petitioned for review of decision of zoning board of adjustment (ZBA) granting the nonprofit's application. A member of the ZBA that voted in favor of granting application also held a position on the non-profit's board of directors. Both the trial court and Commonwealth Court affirmed the ZBA's decision. On appeal, the Pennsylvania Supreme Court ruled on two issues. First, the Supreme Court affirmed Commonwealth Court that the nonprofit's application was *not* deemed denied 45 days after hearing on the application without a decision. The Court determined that when the three "unambiguous" provisions of the Pittsburgh Zoning Code are read together, they allow for an agreed-upon extension of time for creating the record at a ZBA proceeding.

In the second issue, **a matter of first impression**, the Pennsylvania Supreme Court held that a member of ZBA that voted in favor of granting application, who held position on the non-profit's board of directors, was acting under conflict of interest, in violation of objectors' due process right to impartial tribunal. "Actual bias need not be shown in a case where a decision-maker rules on a matter in which he or she has a personal interest." As a result, the Supreme Court remanded for a new hearing on the nonprofit property owner's zoning application before a newly-constituted, untainted panel of the ZBA.

Municipal Governance

Scott v. City of Reading Charter Bd., 266 A.3d 1210 (Pa. Cmwlth. Ct. 2021), *reargument denied* (Dec. 6, 2021).** City Charter Board (Board) appealed Court of Common Pleas' holding reversing Board's Final Order of censure and fines against Mayor for failing to appoint managing director

consistent with city's Home Rule Charter (Charter). Board was created by the City's Charter to determine when violations of the City's Charter occurred. At issue is whether the Mayor followed the procedures laid out in the Charter surrounding the appointment of the City's managing director, which, under the Charter must be selected by the Mayor, and subsequently confirmed by the City Council.

When the previous managing director was terminated, the Mayor designated an acting managing director, who, based upon the investigation of the Board, was never submitted to the Council for approval. When Council sought to use its power to fill the vacancy where no official candidate had been named, the acting director asserted that he had become the permanent managing director by operation of law. Responding to a citizen petition, the Board determined that this was incorrect and found that the Mayor violated the Charter by failing to designate the managing director according to the Charter's procedures.

On appeal, the Court of Common Pleas allowed the Mayor to supplement the record with additional communications and overturned the Board's decision. However, Commonwealth Court reversed, holding that the trial court erred in permitting the Mayor to supplement the record without conducting a *de novo* adjudication of the underlying issues, and further, that no basis existed to set aside the Board's findings of fact. Commonwealth Court concluded that if the Mayor had evidence, it should have been presented to the Board, and the Court may only apply the Home Rule Charter, according to the Statutory Construction Act, upon the evidence received by the Board. Commonwealth Court held that the Mayor's designation of the managing director did not follow the Charter's procedures and therefore, was not effective.

Municipal Services

United Blower, Inc. v. Lycoming Cty. Water & Sewer Auth., 259 A.3d 960 (Pa. 2021). Contractor and subcontractor providing assemblies to waste treatment facility appealed authority adjudication that they had violated the Steel Products Procurement Act (Act) because less than 75% of the "cost" of the components represent steel that has been

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mined, produced, or manufactured in the United States. The hearing officer calculated the cost of the components to include a 10% “mark-up” on the foreign steel incurred domestically for “importing, storing, and shipping.” Furthermore, the hearing officer held that the “denominator” of overall cost for purposes of determining percentage was the cost to the contractor, not the cost paid by the authority. The trial court reversed, and Commonwealth Court affirmed, holding that the 10% mark-up should be excluded from the cost of the foreign steel and that the denominator should be the cost ultimately paid by the public body, although with either denominator, the Act was not violated. The Pennsylvania Supreme Court reversed and remanded. As a matter of first impression, the Supreme Court held that “[the Act] does not permit the winnowing of domestic overhead costs,” and the mark-up should be included in the cost of the foreign steel. Furthermore, the Supreme Court held that the proper denominator was *neither* the amount paid by the authority nor the contractor, but rather the amount paid by the subcontractor who manufactured the blowers, and that the court’s interpretation was consistent with the Act’s purpose of “protecting the domestic steel industry,” and “reduc[es] the risk that the purchase price will conceal the true foreign steel content in a steel product.”

*Tri-Cnty. Sewer Auth., Appellant v. Florence E. Krebs, 2021 WL 5571175 (Pa. Cmwlth. Ct., Nov. 30, 2021).*** Appellant municipal authority (Authority) sought to require an Authority customer to separately connect the customer’s garage bathroom directly to the Authority’s system in compliance with the Authority’s 2012 regulations. Prior to the 2012 regulations, customer had constructed the garage bathroom and interconnected it with the main house sewer connection, when prior regulations would have required individual connection to the sewer system only if the facilities were located on different properties. The Commonwealth Court applied the principal of statutory construction that retroactive effect could only apply where retroactivity is expressly legislatively intended. Although the Municipalities Authorities Act granted the Authority broad rulemaking authority, the court did not find that the Authority had constructed its 2012 regulations in a manner that expressly intended retroactive effect, and recognized

that even if it had, questions of vested rights and contractual issues would have merited consideration.

In Re Chester Water Auth. Tr., 263 A.3d 689 (Pa. Cmwlth. Ct., Sept. 16, 2021). Municipal Authority (Authority) providing water service was initially incorporated by the City to serve the City’s residents, governed by a board appointed exclusively by the City. As the service area expanded, the majority of the Authority’s ratepayers were not residents of the City and the General Assembly amended the Municipalities Authorities Act (MAA) in a manner that caused the Authority’s board to be replaced with a governing body comprised of appointees appointed equally by the City and each of two counties served by the Authority. Thereafter, the Authority was approached by a water utility offering to purchase the Authority’s assets and succeed it as the water service provider.

“Where the General Assembly expressly grants clearly delineated authority, we presume that it does not intend to confer additional authority by implication.”

- Apartment Association of Metropolitan Pittsburgh, Inc. v. City of Pittsburgh

The Authority’s new board rejected the utility’s offer and sought to place the Authority’s assets in trust, with three of the Authority’s board members serving as the trustees.

The City opposed the declaration of trust on the basis that, notwithstanding the MAA amendments designating a new governing body, the Authority’s assets could only convey via the existing statutory rule leaving that power in the hands of the incorporating municipality’s governing body. Commonwealth Court held that the legislature could have amended

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the power to convey when it amended the governing body but did not choose to do so. As a consequence, there was no conflict within the statute. The new governing body has the power to manage the Authority, and the incorporating municipality retains the right to demand the conveyance of the authority's assets. Commonwealth Court remanded for additional proceedings consistent with the ruling.

Municipal and Tax Claims

*In Re Upset Tax Sale held on Sept. 18, 2019 & Oct. 7, 2019, 2021 WL 5286402 (Pa. Cmwlth. Ct., Nov. 15, 2021).*** This appeal concerned the necessity of personal service under the Real Estate Tax Sale Law of an owner-occupant subject to an upset sale of real estate for unpaid taxes. Here, the owner's physical occupation of the property was interrupted when one of the owners was taken into federal custody, and the other owner began alternating between the subject property and another residence due to the owner's work schedule. Although the County Tax Sale Bureau engaged in repeated efforts to notify the owners by certified mail, attempted to provide personal service and even spoke to one of the owners by mail, the Bureau failed to demonstrate that it had succeeded in making personal service directly on either owner, or obtain a waiver from personal service. Because Commonwealth Court had previously held that an incarcerated owner remains an owner occupant, notwithstanding the owner's incarceration, the Bureau could not avoid meeting the personal service requirement and the sale was invalidated.

Police Power (Home Rule)

Apartment Ass'n of Metro. Pittsburgh, Inc. v. City of Pittsburgh, 261 A.3d 1036 (Pa., Oct. 21, 2021). City appealed Commonwealth Court's entry of judgment in favor of apartment association, that the city lacked authority to enact an ordinance prohibiting denial of housing based on a tenant's source of income. Pennsylvania Supreme Court affirmed; neither the general police powers of the Second Class City Code (SCCC), nor the authorization for municipalities to establish human relations commissions in the Pennsylvania Human Relations Act (PHRA), expressly authorized a prohibition on discriminating against residential tenants based on source of income. City, relying on the court's decision in

Pennsylvania Restaurant & Lodging Association v. City of Pittsburgh (summarized in the [LOCAL GOVERNMENT COMMISSION QUARTERLY LEGAL UPDATE, Issue 4, 2019, p.4](#)), argued that the ordinance was permissible as the SCCC and PHRA granted statutory authority. The Supreme Court relied on a two-part test in evaluating the Business Exclusion inquiry: whether the ordinance imposes an affirmative burden on business, and if so, whether the burden is authorized by express statutory authority. The Supreme Court held that the ordinance requires residential landlords to participate in the federal Section 8 Program which, but-for the ordinance, is a voluntary program, and thus does impose an affirmative burden on landlords. City argued that a reading of the general police powers located within the SCCC, together with Subsection 962(b) of the PHRA, provides the required statutory authorization for the ordinance. The Supreme Court disagreed; "Not only does the PHRA not expressly furnish such authority, it also explicitly describes and confers upon local commissions other forms of authority...Where the General Assembly expressly grants clearly delineated authority, we presume that it does not intend to confer additional authority by implication." The Supreme Court affirmed Commonwealth Court's entry of judgment in favor of apartment association.

Public Employment

Clews v. Cty. of Schuylkill, 12 F.4th 353 (3d Cir., Aug. 30, 2021). In this **matter of first impression** in the Third Circuit, the court held that for an employee to be a member of an elected official's personal staff, as would trigger the personal-staff exception to the definition of "employee" covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, the official (1) must work closely with the employee in a sensitive position of trust and confidence and (2) exercise personal control over the employee's hiring, promotion, work conditions, discipline and termination. *See Teneyuca v. Bexar County, 767 F.2d 148 (5th Cir. 1985).*

Here, three former deputy coroners (Plaintiffs), brought an action against the county alleging violations of the FLSA by failing to pay them overtime and then firing them in retaliation for seeking overtime pay. Federal District Court granted summary judgment in favor of the county, concluding that all

three were “personal staff” of the county’s elected coroner and thus cannot bring an FLSA claim. The County Code provides for the hiring of one deputy coroner. (1955, P.L. 323, No. 130 §1211-B). Despite this statutory constraint, multiple people hold the title of “Deputy Coroner” in the county, although they are also referred to as “investigators.”

The Third Circuit found that the record is mixed as to the amount of regular contact the Plaintiffs had with the coroner, and Plaintiffs’ own deposition testimony was inconsistent. The Third Circuit found that the number of deputy coroners “undermines the conclusion that [the coroner] worked closely with all of them.” Moreover, if the coroner died or was removed, it would be the chief deputy coroner who would “execute the office of coroner [and] perform related duties.” (1955, P.L. 323, No. 130 §1232-B).

Applying the factors set forth in *Teneyuca*, the Third Circuit held that based upon the undisputed facts, it could not conclude that the deputy coroners fall under the personal staff exception. The order granting summary judgment was vacated and the matter was remanded to the District Court for further proceedings consistent with this opinion.

** Indicates that this case is UNREPORTED.
See 210 Pa. Code § 69.414

++ This Update does not generally include interlocutory decisions, however, given the current complexity and discussions surrounding public participation in local government board meetings in light of the end of the Governor’s Covid-19 Emergency Declaration, we thought it pertinent to reference this case for further proceedings.

Legislative Updates: *(Continued from page 1)*

HB 2058, PN 2365: Amends the Local Tax Enabling Act to align the deadline by which a local earned income tax or net profits tax return must be filed with the deadline to file a state personal income tax return, as specified. HB 2058 passed the House on December 13, 2021 (202-0) and was given first consideration by the Senate on February 9, 2022.

HB 1877, PN 2528: Introduced by the Local Government Commission, this bill establishes the Municipal Boundary Change Act in Title 53 (Municipalities) by consolidating the existing legal process for contesting a municipal boundary in court, providing statutory procedures for changes in boundaries between municipalities by agreement or referendum, adopting consistent information reporting standards and addressing practical and legal matters between impacted municipalities following a change. *See also SB 877.* HB 1877 passed the House on December 15, 2021 (200-0) and was given second consideration by the Senate on February 7, 2022.

Senate Bill 755, PN 943: Introduced by the Local Government Commission, this bill amends the Pennsylvania Municipalities Planning Code to specifically provide authorization for digital submissions and electronic transmittals of a proposed comprehensive plan or amendment, a proposed land use ordinance or amendment, or an adopted comprehensive plan, land use ordinance or amendment for review, comments, or recommendations. *See also HB 1592.* SB 755 passed the Senate on November 10, 2021 (49-0) and was referred to the House Local Government Committee on November 12, 2021.

SB 275, PN 1163: Amends Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes to prohibit a municipality from adopting specified restrictions or prohibitions on utility services. SB 275 passed the Senate on October 27, 2021 (35-15) and was referred to the House Local Government Committee on October 28, 2021.