LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 2, 2020

Greetings from the Director: In this time of difficulty and uncertainty, the Commission staff extends best wishes to all of our readers and our hopes for everyone's safety and security. Below is our customary selection of municipal law related appellate cases and our selection of bills and recently-enacted laws of note. As you are probably aware, much of the recent activity of the General Assembly has been to address the COVID-19 emergency.

Thank you and be well.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

Act 10 of 2020 amends the Fiscal Code, in part, to provide temporary authorization to the Department of Community and Economic Development to coordinate with the governing bodies and local agencies of political subdivisions to extend filing and payment deadlines for the local earned income tax and net profits tax imposed under the Local Tax Enabling Act, and the waiver of interest, penalties or other tax due.

SB 841, PN 1623: Amends Titles 35 and 42 of the PA Consolidated Statutes to allow local governments increased flexibility on property tax deadlines and discount periods, permit local governments to conduct meetings via telecommunication methods, and give notaries authorization to remotely notarize documents under certain conditions.

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Civil Rights

Greater Philadelphia Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir., Feb. 6, 2020). City enacted an ordinance that prohibited employers from inquiring into a prospective employee's wage history (inquiry provision) in setting or negotiating the employee's wage (reliance provision). Chamber of Commerce sought a preliminary injunction in federal district court to stop both provisions of City's ordinance from going into effect, asserting a violation of free speech on behalf of the Chamber and its members. Chamber acknowledged that the city had a substantial governmental interest in addressing wage disparity but argued that the city did not present sufficient evidence to show the ordinance would address pay disparity. The district court invalidated the inquiry provision on the basis it violated employers' speech rights but concluded that the reliance provision did not impact protected speech. Both sides appealed to the Third Circuit.

The Third Circuit held that the reliance provision did not regulate speech but that the inquiry provision regulated commercial speech. However, the inquiry provision sufficiently advanced City's substantial interest in mitigating racial and gender-based pay gap and was sufficiently narrowly tailored to comply with the First Amendment. Thus, the Third Circuit affirmed the district court's denial of a preliminary injunction as to the reliance provision and vacated the district court's grant of a preliminary injunction as to the inquiry provision.

A note on the COVID-19 Emergency:

The Commission has always strived to be receptive not only to the latest judicial and legislative developments in local government law, but also to the emerging practical concerns facing local government. We realize that the COVID-19 emergency has created new administrative, fiscal, and police power challenges for municipalities everywhere, and we are interested in hearing about those challenges. Please contact the Commission at LGC@palegislature.us to share your experience. Information provided will assist us in advising the General Assembly through this emergency and preparing us all for future events.

Madero v. Luffey, 2020 WL 733766 (W.D. Pa., Feb. 13, 2020). Plaintiff, who cared for stray cats with feeding, shelter and occasional medical care, brought various civil rights and state law actions against defendants including police officer, cat control organization and personnel and animal shelter organization and personnel after an allegedly illegal search, seizure and destruction of animals. After noting that "[t]here are no Pennsylvania cases or statutes specifically addressing the acquisition of property rights in a stray cat," the court offered a detailed analysis of ownership rights in both indoor and outdoor, roaming and returning cats, holding that plaintiff had sufficiently alleged ownership interest for purposes of the claim. It further noted that a city ordinance limiting possession of domestic cats to five had no effect on the analysis of ownership rights. All claims against the animal shelter and shelter personnel were dismissed because those defendants were not convincingly alleged to have been state actors. The court allowed intentional state law tort claims to proceed against the officer and dismissed another under immunity principles. Most claims against cat control organization and its employees were dismissed with the exception of conspiracy to violate civil rights in the service of the warrant alleged against cat control organization and one employee through *respondeat superior*.

Land Use

Victory Gardens, Inc. v. Warrington Township Zoning Hearing Board and Warrington Township, 2020 WL 53885 (Pa. Cmwlth., Jan. 6, 2020). Appellant, upon incorrect advice of Township's then zoning officer that mulching was permitted on a particular plot of land, leased said property in 1999 and began mulching operation. Township was aware of mulching operation, conducting inspections, purchasing and receiving mulch, and resolving various conflicts that arose over the business. In 2015, Appellant received notice of violation that mulching was not a permissible use under zoning ordinance. Appellant appealed the violation. Appeal was denied by Zoning Hearing Board, and Appellant appealed to the court of common pleas, which affirmed Board's denial. Appellant further appealed to Commonwealth Court, which reversed the trial court's order. Appellant claimed that, among other issues, Appellant is entitled to equitable relief under equitable estoppel. The court found that Appellant did rely on the misrepresentation of the Township that mulching was allowed. Based on this misrepresentation, Appellant entered into a lease and purchased equipment and a retail facility. Further, the Township's actions continued to confirm the misrepresentation. Commonwealth Court held that Appellant did meet the standards for equitable estoppel and therefore reversed the trial court's order.

These findings…represent clear, precise and unequivocal evidence that [Appellant] operated its mulching business and made substantial expenditures in reliance on a misrepresentation(s) by the Township, and that [Appellant] would suffer the hardships of loss of substantial expenditures were the ordinance enforced. Therefore, [Appellant] established the necessary elements to prevail under the theory of equitable estoppel.

- Victory Gardens, Inc. v. Warrington Township Zoning Hearing Board.

Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board, 2020 WL 769423 (Pa.Cmwlth., Feb. 18, 2020). Appellant Citizens' group contends that existing regulations prohibiting buildings in excess of fifty feet in height applied to proposed expansion of an existing landfill. After Zoning Hearing Board reviewed the preliminary determination of the zoning officer and rejected Appellant's arguments, court of common pleas affirmed. Commonwealth Court noted that zoning hearing board jurisdiction is limited to issues expressly provided in the Municipalities Planning Code and that an appeal of a zoning officer's determination would be limited to the substantive validity of the zoning ordinance. Where, as here, the appeal was over the merits of the zoning officer's preliminary determination, the hearing board had no jurisdiction.

Drummond v. Robinson Township, 2020 WL 1248901 (W.D. Pa., March 16, 2020). On remand from the Third Circuit, the court examined whether a zoning ordinance prohibiting the use of center-fired rifles in zone where plaintiff maintained a shooting club represented a facial violation of the right to keep and bear arms under the Second Amendment to the United States Constitution. After citing authority holding that a right to keep proficiency at shooting was included with the protection of the Second Amendment, the court analyzed whether the zoning restriction represented a reasonable "time, place and manner" restriction under principles similar to those used in First Amendment jurisprudence, i.e., whether the regulation "reasonably fits with an important governmental interest and leaves open ample alternative channels to exercise the right at issue. And, like the First Amendment, the Second Amendment does not guarantee the right to exercise every conceivable aspect of bearing arms at all times and in all places." The court held the zoning restrictions were valid, finding that the limitation on type of shooting and weapon was reasonably related to intensity and the effect of that intensity on adjoining property and "alternative channels" existed by virtue of other zones where center-fired weapons were permitted.

Municipal and Tax Claims

City of Philadelphia v. Hart, 2020 WL 34313 (Pa.Cmwlth., Jan. 3, 2020). City appealed from an order of the trial court that granted the petition to set aside a tax sale of real property conducted pursuant to the Municipal Claim and Tax Lien Law. The petitioner had argued that the winning bid price of $1,100 at the sheriff's sale was grossly inadequate in light of the fair market value of the property which he asserted exceeded $30,000. The municipal liens on the property exceeded $35,000 at the time of the tax sale but the city stipulated that there would be no personal liability for any of the unpaid municipal liens that remained on the property. The trial court concluded that the property's sale price was grossly inadequate in proportion to the property's value. Prior case law has established that mere inadequacy of price, without more, is not a sufficient basis for setting aside a sheriff's sale, but if a gross inadequacy exists, courts have found proper grounds to set aside such a sale but each case is determined on its own facts. "Grossly inadequate price" has never been established by any court at any given amount or any percentage amount of the sale. Moreover, a presumption exists that the price received at a public sale is the highest and best available. The Commonwealth Court determined that the property's $1,100 sale price was not grossly inadequate even though it was a small percentage of the property's fair market value since the petitioner had no equity in the property to protect and was not personally responsible for any of the unpaid liens after the tax sale. Accordingly, the Commonwealth Court reversed the trial court's order.

In re: Public Sale of Properties Pursuant to Section 610 and Section 703(b) of the Real Estate Tax Sale Law, 2020 WL 40015 (Pa.Cmwlth., Jan. 3, 2020) (UNREPORTED; *See* 210 Pa. Code § 69.414). Because no bidder offered the upset price for the tax delinquent property at issue, the tax claim bureau filed a petition with the trial court in order to conduct a judicial tax sale pursuant to the Real Estate Tax Sale Law (RETSL). The trial court issued upon interested parties a rule to show cause why the property should not be sold free and clear of all tax and municipal claims, mortgages, liens and other charges. Subsequently, the trial court issued an order permitting the judicial sale, and no representative of Mortgagee was present at the sale. After the judicial sale, Mortgagee filed a petition to set aside the sale on the grounds that the property sold for a grossly inadequate price and that the bureau failed to comply with RETSL's notice requirements which deprived Mortgagee of actual notice of the judicial sale. The trial court denied Mortgagee's petition and explained that it found service on Mortgagee proper based on prior case law since Mortgagee did not present evidence that the individual who signed for the Rule was not Mortgagee's authorized agent. The Commonwealth Court held that under section 611 of RETSL, if the party is outside the Commonwealth, a tax sale bureau must demonstrate that a sheriff provided notice by registered mail and must produce a sheriff's return. As there was nothing in the record to show that it was the sheriff as opposed to the bureau or some other person who sent the rule to Mortgagee, the Commonwealth Court determined that the trial court erred in concluding that service of the Rule was made upon Mortgagee in accordance with section 611 of RETSL. Thus, the Commonwealth Court reversed the trial court's order.

Matter of Tax Sale 2018-Upset, 2020 WL 962423 (Pa.Cmwlth., Feb. 28, 2020). The issue on appeal to the Commonwealth Court was whether Taxpayers were entitled to notice of the option to enter into an installment agreement *before* paying 25% of the outstanding tax delinquency. Taxpayers argued that notice of an upset sale was not properly given as it did not advise them of their rights under section 603 of the Real Estate Tax Sale Law. Taxpayer explained that when she read the notice she did not understand it to mean that if she paid 25% of the amount due, she would be *entitled* to enter into an installment agreement for the balance of her delinquent taxes owed prior to the sale of the property. She explained that she had been denied such an option in the past.

The trial court concluded that *after* a property owner has paid at least 25% of the delinquent taxes due, a taxing authority is required to inform the property owner of the option to enter into an installment agreement to pay the rest of the delinquent taxes, and the failure to do so is a due process violation. But since Taxpayers did not make the 25% payment, Section 603 was not applicable and Taxpayers were not entitled to explicit notice of the installment agreement option.

On appeal, the Commonwealth Court determined that Section 603 does not grant a taxpayer with any vested right or entitlement to enter into an installment agreement. This burden is not placed on a tax claim bureau until *after* 25% of the delinquent tax liability is paid. A bureau has discretion ("at the option") to enter into such an agreement. Therefore, Taxpayers were not entitled to notice as a matter of constitutional due process. Taxpayers would have only been entitled to such notice if they had made a qualifying payment, which they did not. Thus, the Bureau was under no duty to provide any notice that an installment agreement was available. Consequently, Commonwealth Court affirmed the order of the trial court.

Municipal Services

North Fayette County Municipal Authority v. Municipal Authority of Westmoreland County, and Pennsylvania-American Water Company, 2020 WL 57333 (Pa. Cmwlth., Jan. 6, 2020). North Fayette County Municipal Authority (Authority) was incorporated under the Municipal Authorities Act of 1945 to supply water service to multiple municipalities within Fayette County, including, relevant to this case, *portions* of Uniontown (emphasis in original). Authority contracted in 1985 with Pennsylvania-American Water Company (Company) for a bulk water supply agreement, which was terminated by the Authority effective 2015. Municipal Authority of Westmoreland County (MAWC) is authorized via its enabling legislation to supply water to Fayette County. MAWC and Company entered into a bulk water purchase agreement in 2015 to supply water to Uniontown. Authority filed a complaint alleging the agreement violates the Municipal Authorities Act, specifically Section 5607(b) prohibiting municipal authority competition. Trial court dismissed the complaint, holding that the prohibition is meant to prevent authorities from competing with private business, not other authorities. Commonwealth Court held that the trial court erred in finding that the competition prohibition does not apply to municipal authorities; however, the court affirmed the dismissal of the complaint. The court held that the competition protection "extends only to the service area identified by an authority's enabling legislation", and as the Uniontown district was not specifically identified in Authority's incorporation, Authority was not protected under the Act.

Public Employment

City of Pittsburgh v. FOP, Fort Pitt Lodge No 1, 2020 WL 355370 (Pa. Jan. 22, 2020). Appellant bargaining unit challenged city's decision to use call-outs to staff marathon event when voluntary outside employment opportunities did not result in an adequate number of officers to staff the event. The arbitrator found that the city did not inappropriately mandate outside employment, which is guaranteed to be voluntary, and rather used its call-out procedure to staff the event, however, the arbitrator awarded an entire day of pay as an equitable remedy for the cancellation of the call-out day. The statutory appeals court and Commonwealth Court rejected the arbitrator's decision to award an increase in paid hours through the application of the essence test. Supreme Court overturned the Commonwealth Court by reaffirming that the court should not have applied the essence test or sought to review the ar-

bitrator's decision, even for a clear error, unless the dispute was outside the arbitrator's jurisdiction or authority, a finding of irregularity in the proceedings, or where constitutional rights of the parties had been violated.

Taxation and Finance

Ceramic Art & Culture Institute, v. Berks County Board of Assessment Appeals, 2020 WL 769426 (Pa. Cmwlth., Feb. 18, 2020). Commonwealth Court examined whether an art organization could seek a tax exemption for a building that housed its operations including ceramic instruction, community art gallery space and programs for disadvantaged and low-income youth. The application for the tax exemption was made after the organization entered into an agreement to purchase the property from the parents of the executive director of the organization. In addition to applications of existing caselaw finding that the organization was a purely public charity eligible for the tax exemption and that the organization was regularly using the subject property for charitable purposes, the Commonwealth Court examined the issue of whether the provision of the Consolidated County Assessment Law permitting equitable ownership was an unconstitutional expansion of Article VIII, Section 2 of the state constitution. The court held that because neither the state constitution nor assessment law treat legal and equitable title holders differently, there was no expansion of the constitutional exemption and the issue was not a basis to reject the exemption. If the objecting school district wanted to argue that the sales arrangement was a sham sale to seek the exemption, it would have needed to pursue that argument with evidence before the trial court.

Kennett Consolidated School District v. Chester County Board of Assessment Appeals, 2020 WL 962421 (Pa.Cmwlth., Feb. 28, 2020). School District requested that its consultant review all property assessments within the district and asked for recommendations for possible appeals to file against assessed properties. The request explicitly stated that the review should not be limited to any particular class of property in the taxing district but that all classes including commercial, residential, and otherwise should be reviewed. School District subsequently decided to appeal 12 of the identified 13 properties, all of which were commercial properties, as having a high probability of being underassessed by more than $1 million of market value. The trial court denied Taxpayer's motion to quash the appeal and upheld the fair market value and resulting assessment of the Property.

On appeal to the Commonwealth Court, Taxpayer argued that the appeals of only commercial properties and basing appeals on the monetary value violated the Uniformity Clause. School District argued that a cost/benefit analysis does not run afoul of the Uniformity Clause, because there is no restriction on the methodology in determining whether to appeal an assessment. Further, School District asserted that a methodology that narrows the class of properties evaluated for appeal based on economic thresholds does not violate the Uniformity Clause.

Commonwealth Court explained that there is a balance to be struck between a school district's ability to appeal an assessment and the Uniformity Clause. The court noted that the record reflected that School District intentionally disregarded the type of property and, therefore, its actions in appealing the assessments of commercial properties were inherently not deliberate. Moreover, School District's actions did not systematically target commercial properties, but only focused on properties that would be worth the cost and expense of an appeal. Commonwealth Court concluded that a policy that attempts to be fiscally responsible by only appealing assessments that would generate enough revenue to justify the cost of the appeal does not violate the Uniformity Clause.

The court noted that there was no indication School District would not have appealed the assessment of residential properties in the event that such properties would have fallen within its fiscal parameters. The mere fact that all appealed properties were commercial does not *per se* create a violation of the Uniformity Clause. Moreover, School District used a monetary threshold only for the purpose of making prudent fiscal decisions, and not for the purpose of discriminating against sub-classes of properties. Because School District deliberately ignored the property type and focused only on its fiscal considerations, School District did not violate the Uniformity Clause. Accordingly, Commonwealth Court affirmed the order of the trial court.

Emergency Services

In re: Independent Fire Co. No. 1 a nonprofit corporation, 2020 WL 563505 (Pa.Cmwlth., Feb. 5, 2020). (UNREPORTED; See 210 Pa. Code § 69.414). The Office of Attorney General, Charitable Trusts and Organizations Section appealed from the Lycoming County Court of Common Pleas' denial of its petition seeking a rule to show cause why Fire Company should not be involuntarily dissolved and its assets distributed pursuant to the *cy pres* doctrine. Fire Company had been decertified by Borough in fighting fires within the municipality's borders.

The issue was whether the Commonwealth, without obtaining an order of involuntary dissolution under the Nonprofit Corporation Law of 1988, could acquire and transfer all the general assets of an operating, non-defunct charitable nonprofit corporation to the Borough's current certified firefighting company pursuant to the *cy pres* doctrine as codified in the Uniform Trust Act. However, Fire Company still functioned as a nonprofit corporation as it retained members, held meetings, maintained minutes, filed taxes, engaged in charitable community activities and responded to multiple emergency calls, although none of the calls were for fighting fires.

Commonwealth Court stated that the Commonwealth failed to prove a basic precondition for application of *cy pres*, i.e., failure to identify specific assets that were placed in "trust," even though the trial court found that Fire Company's charitable purpose had become "impracticable." Commonwealth Court applied the holding in *Lacey Park Volunteer Fire Company No. 1* (Pa.Cmwlth.1976) that a nonprofit corporation owns its equipment and real estate until its members decide the future of the corporation and its property. Thus, although Borough may have lawfully decertified Fire Company, Fire Company retained its exclusive ownership of its real and personal property that it possessed and generally has the legal authority to decide the future of its assets and status as a charitable nonprofit corporation, e.g., whether it wishes to dissolve voluntarily or merge with another firefighting company. The court noted that only under certain extreme circumstances may the Commonwealth pursue involuntary dissolution.

Legislative Updates:

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HB 2371, PN 3498: Amends Title 53 of the Pennsylvania Consolidated Statutes to authorize county commissioners in counties of the third class to levy occupational taxes. This bill also repeals Section 202 of the General County Assessment Law as it applies to counties of the third class. This bill was referred to the House Local Government Committee on March 25, 2020.

HB 2068, PN 3343: Amends Title 74 of the Pennsylvania Consolidated Statutes to add Chapter 19, Local Mass Transit Funding, which authorizes counties to levy a tax for mass transportation revenue purposes for local transportation organizations. Counties may make grants from tax revenue collected for specified purposes. This bill was referred to the House Transportation Committee on February 24, 2020.

SB 1068, PN 1584: Amends Article IX of the Pennsylvania Constitution by adding section 15, which allows for the removal of elected municipal officers for cause, such as absenteeism or dereliction of duty. As a proposed constitutional amendment, the resolution must pass two consecutive sessions of the General Assembly and be advertised in newspapers upon each passage before being submitted to the electorate for approval. This is this first consideration of this proposed constitutional amendment.