



# LOCAL GOVERNMENT COMMISSION

## Quarterly Legal Update

Issue 2, 2021

### Greetings from the Director:

As we all seek to safely enjoy a "re-opened" summer season, please accept a new contribution to your reading list: our customary compendium of appellate cases impacting municipal law. Land use, tax collection, the First Amendment, and road law, among others, are subjects of recent rulings we have chosen to summarize in this edition. We have also included a handful of topical legislative acts of interest. Our best wishes to you for fun in the sun.

-David Greene, Executive Director of the Local Government Commission

### Legislative Updates:

HB 264, PN 1003: Amends the Real Estate Tax Sale Law to require any person who intends to bid at a schedule tax sale to appear and register at the tax claim bureau not less than 10 days before the scheduled sale. The county is authorized to establish a fee for the filing of an application to register. The owner and immediate family members of the owner shall have no right to purchase the owner's property at a judicial sale, a private sale or from the bureau's repository for unsold property under the provisions of this act. This bill was signed into law as Act 33 of 2021 on June 30, 2021.

*Continued on page 5 >>*

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### Civil Rights

*McGuire on behalf of Neidig v. City of Pittsburgh*, 2021 WL 900935 (Pa. Cmwlth., Mar. 10, 2021). Appellant was awarded damages after prevailing on a federal civil rights claim against City police officer who was determined to have acted "under color of state law." Officer assigned his rights to be indemnified by the City under the Political Subdivision Tort Claims Act for the damages to Appellant. Appellant brought a state court declaratory judgment claim alleging that city failed to comply with its alleged obligation to indemnify officer. Following a jury trial, the trial court denied the parties' post-trial motions and entered judgment on the jury verdict in favor of City. Commonwealth Court affirmed. The Court agreed with the trial court that the officer could assign his rights to indemnification to a private citizen and that Appellant had standing to pursue indemnification. In a matter of first impression, a federal determination that an officer acted under color of state law does not mean that a police officer acted "within the scope of his office or

employment," for purposes of the Political Subdivision Tort Claims Act, and, consequently, the City was not collaterally estopped from arguing against indemnification. The Court also affirmed the trial court with regard to evidentiary matters and jury instructions.

*Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County*, 2021 WL 719671 (W.D. Pa., Feb. 24, 2021). Port Authority appealed District Court's decision granting the Union's preliminary-injunction motion, enjoining Port Authority from enforcing its facemask policy to ban employees from wearing "Black Lives Matter" face-masks. Port Authority requested District Court to stay its injunction order pending that appeal. District Court concluded Port Authority is not entitled to a stay of the Court's injunction during the pendency of its appeal. Court found that: (1) a stay would cause substantial harm to Union and its members; (2) Port Authority failed to establish that it would suffer irreparable harm without a stay and that a stay would be in the public interest; and (3) Port Authority is not likely to succeed on its appeal.

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## Land Use

*Lawrenceville Stakeholders et al v. City of Pittsburgh Zoning Bd of Adjustment*, 247 A.3d 465 (Pa. Cmwlth., Mar. 5, 2021).

Prospective land developer obtains equitable title to a parcel of land conditioned on receiving zoning approval for a prospective development project. Proposed project requires a series of dimensional variances to allow the construction of five townhomes on an irregularly shaped lot. Concerned neighbors group appeal zoning board decision to grant the variances on the basis that the project would require the placement of the homes in an irregular arrangement that staggers the homes in a nature out of character with the surrounding neighborhood and would necessitate that the homes face a commercial alley. The Commonwealth Court here examines whether the evidence presented by the developer to obtain the dimensional variances was substantial evidence. In essence the developer testifies that the project sought necessitated the placement of five townhomes to overcome the cost of acquiring, and developing the site, but was not adequate to determine that there was no possibility that the property could be developed in compliance with the zoning ordinance. Where, as here, the developer has acknowledged that the parcel could be developed in compliance with the ordinance if fewer townhouses were constructed, the fact that it would be less profitable from the developer's perspective was insufficient to justify the dimensional variance.

*Southpointe Golf Club, Inc. v. Board of Supervisors of Cecil Township*, 2021 WL 646479 (Pa. Cmwlth., Feb. 19, 2021). Golf club appealed trial court decision denying a challenge to the procedural validity of a zoning ordinance and affirming the zoning hearing board denial of the substantive validity of the ordinance. The ordinance in question set forth the conditions under which appellant would be permitted to change the use of its property and contained a provision specifying that "additional standards may be waived by the Board of Supervisors, in their sole discretion, if Applicant submits a petition signed by 100% of the adjacent property owners, within and outside the [zoning district], consenting to the proposed change in the Land Use Category and/or Land Use." Commonwealth Court reversed. Without reaching the question of the procedural validity of the ordinance or other substantive challenges, the Court held that the "consent provision"

within the ordinance constituted an impermissible delegation of zoning authority away from the governing body to adjacent landowners without adequate protections against arbitrary or capricious decision-making.

*Lamar Advantage GP Company, LLC v. City of Pittsburgh Zoning Board of Adjustment*, 244 A.3d 348 (Pa., Jan. 20, 2021). Appellee company had long displayed an electronic advertisement on a billboard overlooking City. Appellee then placed static, vinyl sign over the electronic advertisement and the underlying structure. City cited company for "enlarging" and "replacing" the sign. City Zoning Board of Adjustment upheld the citation, agreeing that Appellee's actions enlarged or replaced the sign. On appeal, the trial court reversed the board and the Commonwealth Court affirmed the trial court's holding that the Board's conclusion was unsupported by the record. The Pennsylvania Supreme Court agreed. Because Appellee had established the sign as an existing nonconforming use and proved that no structural changes had been made to the underlying sign, the Court distinguished earlier Commonwealth Court precedent (*Lamar Advertising Co. v. Zoning Hearing Bd. of Monroeville*, 939 A.2d 994 (Pa. Cmwlth. 2007)) holding that replacing vinyl signs with electronic signs constituted an "alteration" of the signs within the meaning of a different ordinance.

*In re Vacating of Old Route 322, Paint Township*, 2021 WL 799728 (Pa. Cmwlth., Mar. 3, 2021). After proceedings under the "General Road Law," 36 P.S. 1981.2 for the vacation of a township road, owners appealed trial court order dismissing their exceptions to a board of view report finding that the road was not "useless, inconvenient or burdensome" and the trial court's acceptance of the recommendation not to vacate the road. Owners initially objected on the basis that the township lacked standing to protest vacation because of the private access rights of owners along the road. Furthermore, the owners objected to the consideration of "speculative" future utility of the road and the receipt of liquid fuels funds. The Commonwealth Court affirmed the trial court holding that the township had standing under existing precedent and that arguing that access by private entities spoke to the utility of the road and was not an issue of standing. Furthermore,

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the evidence presented was substantial, and precedent established that vacation of roads was held inappropriate even where predominantly private rights were at issue.

## **Municipal and Tax Claims**

*Auston v. County of Northampton Tax Claim Bureau*, 247 A.3d 1189 (Pa. Cmwlth., Jan. 12, 2021).\*\* Owner appealed trial court order denying exceptions to tax sale under the Real Estate Tax Sale Law (RETSL) on September 25, 2018 for delinquent 2016-2017 school property taxes in the amount of \$1,849.33. Owner argues that because she paid her 2017-2018 school taxes directly to the school district in the amount of \$1,883.18 prior to the upset sale, sale of the Property was invalid. The Tax Claim Bureau contended that Owner failed to pay her 2016-2017 school taxes, and therefore, the trial court correctly refused to invalidate the upset sale of the Property. Commonwealth Court affirmed. After owner argued that the “Pardee principle” should apply, i.e., payment credits should be applied to the earliest debts, the Court observed that “[n]ot only does this request overlook the logistical reality that the TCB was not involved in the receipt of the 2017-2018 payment, but rather [school district], it also imposes requirements on the TCB outside of the RETSL.” Given that RETSL provides a comprehensive legislative scheme for the collection of property taxes, the Court refused to impose additional procedural requirements on the TCB when all existing procedures requirements were fulfilled.

*In Re Consolidated Return of Tax Claim Bureau of Indiana County from September 16, 2019 Upset Sale for Delinquent Taxes*, 2021 WL 865358 (Pa. Cmwlth., Mar. 9, 2021). Former owners who had not paid any portion of delinquent taxes in question objected to upset sale of property under the Real Estate Tax Sale Law

alleging that tax claim bureau had an obligation to inform them of availability of payment plan. The trial court dismissed their objections and Commonwealth Court affirmed. The law does not require the tax claim bureau to inform owners of payment plan availability unless 25% of delinquent amounts have been paid.

*Gonzalez-Anastasio v. Tax Claim Bureau of Lehigh County*, 247 A.3d 1196 (Pa. Cmwlth., Jan. 27, 2021).\*\* Appellant filed pro se appeal of Common Pleas order denying her petition to set aside a tax sale, asserting the tax claim bureau failed to provide proper notice of the tax sale pursuant to the Real Estate Tax Sale Law (RETSL). Trial court denied petition because she was not a record owner of the subject property. Commonwealth Court affirmed the decision of the trial court, holding that the subject property was always under the ownership of 1031 Exchange, LLC, and the pending marriage settlement agreement between Appellant and estranged spouse, who is an owner of 1031 Exchange, LLC, did not confer ownership rights to Appellant.

## **Municipal Authorities**

*City of Harrisburg v. Intergovernmental Cooperation Authority for Harrisburg*, 247 A.3d 1183 (Pa. Cmwlth., Jan. 7, 2021).\*\* Authority filed preliminary objections to the petition for review filed by City, Mayor, and Director of Financial Management. Petition sought declaration that Director has right to participate in Authority’s executive sessions and an injunction to enjoin Authority from excluding Director. Authority preliminarily objects to the City and Mayor’s standing in filing of petition for review.

*Thus, in the context of federal jurisprudence, the determination...that Neidig acted under color of law does not dictate that Neidig acted within the scope of his employment. This Court...holds that the trial court properly concluded that the City was not collaterally estopped from asserting that Neidig acted beyond the scope of his employment when he injured McGuire.*

- *McGuire on behalf of Neidig v. City of Pittsburgh*

Court sustained Authority's preliminary objection, dismissed City and Mayor from petition for review, and directed Authority to file an answer to Director's petition, holding that City and Mayor have no substantial, direct, and immediate interest in this matter.

## Police Power

*City of Philadelphia v. Dvortsova*, 2021 WL 68330 (Pa. Cmwlth., Jan. 8, 2021). Property owner appealed civil penalty imposed by the trial court following a dispute over a construction project where appellant initially failed to obtain install a fire suppression system and obtain related permits. The City issued a notice of violation and stop work order upon discovery of the deficiency and initiated an action in equity to correct the problems. The parties then agreed under supervision of the County court on corrective actions that would be taken by the appellant at an agreed-to timeline. Failing to meet the timeline established by the agreement with the City, the trial court imposed the civil penalty on the basis that the Appellant be subject to a daily penalty since the initial notice of violation. On appeal, Appellant contended that it had complied with the stop work order by ceasing construction and vacating the premises, and that the notice provided by the City established only that the fire suppression system would need to be installed for construction to continue. Commonwealth Court agreed, finding that the notice and order cannot be the basis for the fine, where the City cannot show a violation of the order's conditions.

*Weis Markets, Inc. v. Lancaster Township*, 2021 WL 115945 (Pa. Cmwlth., Jan. 13, 2021).\*\* Appellant Township contended that trial court erred in reversing the Township's decision to deny an intermunicipal liquor license transfer to Weis Markets. The Township denied the transfer on the basis that the additional license would threaten the health, welfare, peace, and morals of the Township and that there were nearby establishments including a casual restaurant, pizza shop and beverage distributor offering other forms of alcohol sales. The court rejected the Township's contention that the decision to deny the license transfer could be made without being based on substantial evidence because it had previously held that a license transfer was not inherently detrimental to a

community. In consideration of the evidence that was presented, the Court found that the Township erred in applying a proximity standard that can be a basis for a decision by the Liquor Control Board but is not a basis for rejection of a license transfer by the municipality. To reject the transfer, the Township would need to demonstrate by substantial evidence that the transfer would have an adverse impact on the residents of the municipality.

*It is undisputed that both the City and the Mayor are very interested in the actions of the Authority as they will impact City operations once the five-year plan and intergovernmental cooperation agreement are implemented... [T]hese future interests do not equate to a present substantial, direct, and immediate interest so as to confer standing in the instant matter..*

- *City of Harrisburg v. Intergovernmental Cooperation Authority for Harrisburg*

## Public Employment

*Romutis v. Borough of Ellwood City*, 246 A.3d 361 (Pa. Cmwlth., Feb. 10, 2021). Borough police chief is removed from his position after council decides to eliminate the position of chief of police. Pursuant to the employment contract between the Appellant chief and Borough, Appellant is offered a conditional severance constituting six months' pay. Appellant contests the termination on the basis that the elimination of the position is not one of the statutory causes for removal designated in the Borough Code. Finding that the parties agreed

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that the chief had not been hired under the civil service designation, the trial court granted the Borough's motion for summary judgment. On appeal, appellant argued that application of the Commonwealth Court's decision in *Braun v. Borough of Millersburg*, 44 A.3d 1213 (Pa. Cmwlth., 2012) limits his removal to just cause under the Borough Code, and that the removal without just cause provision of the contract were contrary to public policy. Commonwealth Court distinguished *Braun* and upholds the trial court by finding that the removal provisions of the Borough Code only apply to a chief if the chief is hired through the civil service process that it had previously held was optional under the Borough Code.

*Cook v. City of Philadelphia*, 246 A.3d 347 (Pa. Cmwlth., Feb. 5, 2021). Appellant Police Officer applicant was excluded from the civil service list of the City as a result of the outcome of a psychological evaluation. The applicant sought to appeal the exclusion as an adjudication under the local agency law, which the City contested on the basis that the applicant could not have a property right interest in a civil service list, and thus had no basis to pursue the appeal. In granting a motion to quash discovery and denying the applicant's motion for an evidentiary hearing, the Trial Court agreed with the city and found the appeal moot. On appeal the Commonwealth court examined whether "fair access to public employment" constitutes an adjudication. The court looked to precedents where fair access justified an appealable interest where current employees were excluded from sitting for a promotional exam and distinguished an applicant's interest in prospective employment (for which there is no property right justifying an appeal) and an applicant's interest in fair access to the process. Where, as the applicant contended here, the city did not follow its own civil service rules in failing to allow the appeal of the exclusion, the Appellant has a property right interest in fair access to public employment to appeal the adjudication.

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

## Legislative Updates: *(Continued from page 1)*

**SB 554, PN 875:** Amends the Sunshine Law in Title 65 (Public Officers) of the Pennsylvania Consolidated Statutes to require a public agency to make its meeting agenda available to the public. Once the agenda has been finalized and posted for the public, the agency may not take any official action on any item that is not listed on the notice, except in emergency situations or to consider matters that are de minimis in nature. This bill was signed into law as Act 65 of 2021 on June 30, 2021.

**HB 957, PN 1852:** Amends the Municipality Authorities Act (53 Pa.C.S, Chapter 56) to allow the owner of multiple properties or units that are served by a single meter to periodically request the authority to perform a rate study to determine if the rate the owner is paying is accurate. The rate study must use a minimum of one year's worth of usage data. This bill was signed into law as Act 43 of 2021 on June 30, 2021.

**SB 674, PN 745:** Amends Title 8 of the Pennsylvania Consolidated Statutes by: (1) adding language providing that an elected or appointed official of a borough may not be surcharged if the official acting in good faith on a written or publicly disclosed opinion of the borough solicitor; (2) authorizing a borough to appoint a partnership, limited partnership, association, or professional corporation as the borough manager; (3) permitting the civil service commission of a borough to reorganize within 30 days of the first Monday in January of each even-numbered year; and (4) removing a requirement that a preliminary budget be prepared beginning at least 30 days prior to the adoption of the budget. This bill passed the Senate unanimously on June 25, 2021, and was referred to the House Local Government Committee on June 28, 2021.