Local Government Commission
Quarterly Legal Update

Issue 3, 2019

As fall hits its stride, we take this opportunity to look back at some crucial cases decided by our federal and state courts in the last few months and examine how they affect municipal law in the Commonwealth. Included in our write-ups are game-changing United States Supreme Court decisions on eminent domain and religious symbols on government property, as well as Pennsylvania decisions interpreting planning procedures, neighborhood improvement districts, and employment law. We have also included some local government bills moving in the General Assembly. Please stay tuned for our next edition during the holiday season; we always appreciate your interest.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

HB 305, PN 2574: Creates the State-owned Assets and Mobile Broadband Services Act to provide for inventory of State and county owned assets for development of mobile broadband services in unserved and underserved areas. HB 305 passed the House. Given second consideration by the Senate; referred to the Senate Appropriations Committee.

SB 146, PN 1160: Amends Title 35 (Health and Safety) of the Pennsylvania Consolidated Statutes to establish an online training program for firefighters, under the direction of the State Fire Commissioner. SB 146 passed the Senate and was given first consideration by the House.

HB 1035, PN 1207: Amends Act 78 of 1979 to authorize political subdivisions and authorities to enter into contracts for "services," as defined, when two consecutive advertisements fail to induce bids. HB 1035 was passed by House and referred to the Senate Local Government Committee. This legislation is sponsored by the Local Government Commission.

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Agency Law

County of Butler v. CenturyLink Communications, LLC, et al., 207 A.3d 838 (Pa., Apr. 26, 2019). Commonwealth's "911 Act" imposed duties upon the Pennsylvania Emergency Management Agency ("PEMA") to enforce collection of fees imposed by Counties on local telephone exchange customers for administration of local 911 system. Appellee County sought to use common law enforcement remedies in the collection of fees for the failure by the local telephone operators to adequately meet the fee collection obligations. Supreme Court reversed Commonwealth Court's finding that the statutory duty on PEMA did not specifically preclude the County's efforts on the basis that the General Assembly evidenced its intent to create an exclusive enforcement remedy by creating a statutory schema providing for enforcement by a state agency.

Code Enforcement

Cannarozzo v. Borough of West Hazelton, 2019 WL 2504086 (M.D. Pa., June 14, 2019). After de novo review, the District Court chose not to adopt the Report and Recommendations of the Magistrate to dismiss various claims of Plaintiff. After a fire at Plaintiff's 5-unit rental property had been extinguished, but emergency personnel remained on the property, Defendant code inspector and commercial building inspector entered the premises and completed a warrantless search of areas of the property beyond where the fire began. The search revealed electrical code violations and resulted in condemnation of the building. In a §1983 action, Plaintiff alleged a Fourth Amendment violation, *Monell* municipal liability, and asserted that qualified immunity was not appropriate for a code officer. The Magistrate held that a warrantless search did not violate constitutional protections because the facts "strongly suggest that the inspection falls within the fire emergency exigency exception" to warrant requirements. The District Court disagreed, holding that because the fire was extinguished, the nature of a necessary ongoing "emergency" was not determined at this stage in the proceedings and granting a motion to dismiss was premature. Furthermore, the District Court held that the derivative dismissal of the *Monell* claim and conclusions regarding qualified immunity were similarly unwarranted.

Economic Development

Schock v. City of Lebanon, 210 A.3d 945 (Pa., May 31, 2019). In a proceeding to adopt a business improvement district (BID) plan pursuant to the Neighborhood Improvement District Act, Act 130 of 2000, the City received valid objections from assessed property owners attaching to 132 non-exempt properties. This number represents less than 40% of the BID's total number of properties (358), but more than 40% of its non-exempt properties. Positing that both exempt and non-exempt property owners constituted "affected property owners" for purposes of the threshold to reject the plan, the City proceeded with the BID. Appellant owner brought a declaratory judgment action requesting that the court declare the threshold as "40% of the assessed parcels," as opposed to 40% of all parcels within the geographic boundaries of a BID. The trial court granted the City's motion for summary judgment. Commonwealth Court agreed in a divided published decision. The Pennsylvania Supreme Court reversed. "Affected property owners," for purposes of the final-plan-veto procedure for a proposed BID, would be the owners of "benefited properties" located within it, which, as referenced under the Neighborhood Improvement District Act, would only include assessed properties.

Eminent Domain

Knick v. Township of Scott, 139 S.Ct. 2162 (Jun. 21, 2019). Plaintiff required by ordinance to open property to visitors of a family graveyard during daylight hours brought a claim for inverse condemnation under state law. The township withdrew enforcement of the ordinance and the state court refused to proceed absent an injury. The plaintiff then brought a §1983 action in federal court, which was dismissed in light of *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), requiring that a plaintiff seek just compensation under state law before bringing a federal claim. The Third Circuit affirmed, although it noted that the ordinance and underlying law were extremely suspect. In a 5-4 decision, the Supreme Court reversed and overruled *Williamson County*. The Court held that the violation of the Fifth Amendment occurs at the time the government takes property without paying for it and at that time a claim may be brought. Contrary to what the dissent suggested, the majority noted that governments need not fear the invalidation of regulations since "as long as just compensation remedies are available . . . injunctive relief will be foreclosed." The overruling of *Williamson* was appropriate because of "exceptionally ill-founded" reasoning and because the state-litigation requirement was "unworkable in practice."

First Amendment

American Legion v. American Humanist Association, 139 S.Ct. 2067 (Jun. 20, 2019). The Bladensburg Peace Cross, a 1925 World War I memorial, was challenged as violating the Establishment Clause. The Fourth Circuit held that the monument violated the constitution, holding under *Lemon v. Kurtzman* that the continued public maintenance of the cross, a "preeminent symbol," would be seen by a reasonable observer as public endorsement of Christianity, and rejected argument that passage of time ameliorated such an observation. Concluding that "the cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else [the monument] has come to represent," a majority of the Court held that beyond the fact that the Latin cross is strongly associated with W.W.I, the passage of time has ascribed secular purposes and meaning to the monument and discerning the precise motivation behind its creation is difficult. Further, after a protracted amount of time, removal of a religiously expressive monument may no longer appear "neutral" in motivation. Although seven of the nine justices concurred in the judgment, only a plurality took the position that the *Lemon* test was inapplicable here or no longer workable. Justice Ginsberg, joined by Sotomayor, wrote in a dissenting opinion that a rebuttable presumption of endorsement arises when a religious symbol is maintained on public property, and that the presumption was not overcome in this case.

Jurisdiction

Finan v. Pike County Conservation District, 209 A.3d 1108 (Pa.Cmwlth., May 2, 2019). County conservation district is local agency rather than hybrid agency, which, if a hybrid agency, could be treated as both local agency and Commonwealth agency for jurisdictional purposes depending on the claims alleged. The enabling statute for conservation districts provides that a conservation district is a Commonwealth agency exercising public powers of the

Commonwealth. However, a conservation district is governed by a board selected by the county governing body, the district operated only within the county and depended on an agreement with the Department of Environmental Protection (DEP) to implement any regulations statewide, and the county, rather than the state, made spending decisions related to district. Thus, any litigation against the conservation district challenging local implementation of statewide laws charging application fees is proper in a Court of Common Pleas since the conservation district performs functions within a county as delegated by DEP.

Labor

Lower Swatara Township v. Pennsylvania Labor Relations Board, 208 A.3d 521 (Pa.Cmwlth., May 2, 2019). The Commonwealth Court ruled that Act 111 police officers were not individuals employed as guards under the Public Employe Relations Act (PERA), affirming the decision of the Labor Relations Board that determined that PERA does not prohibit the union representing township's public works employees from also representing all township police officers. Act 111 police officers are not permitted to strike, but have right to bargain collectively with their public employers. PERA's reference to "individuals employed as guards" who had to be separated from other employees in collective bargaining to ensure that during strikes or labor unrest, employer would have guards who could enforce rules for property protection and safety, was intended to apply only to individuals who were employees under PERA, which expressly does not include Act 111 police officers. Therefore, township's police officers have a right to be represented by the collective bargaining representative of their choice.

Fraternal Order of Police, Fort Pitt Lodge No. 1 vs. City of Pittsburgh, 2019 WL 1500929 (Pa. Cmwlth., April 4, 2019) (UNREPORTED; *See* 210 Pa. Code § 69.414). City police officer eligible for promotion to sergeant was passed over at Mayor's discretion. The officer contested the decision by grievance before an arbitrator under the provisions of the Police and Fireman Collective Bargaining Act. At issue was whether arbitrator's decision to bifurcate the grievance to first determine arbitrability without hearing merits of the grievance violated officer's due process rights. Commonwealth Court affirmed arbitrator's decision that the grievance was not arbitrable as selection for promotion is a managerial prerogative which had not been bargained away, and not therefore subject to a presentation of evidence on the merits prior to the arbitrator's decision.

Land Use

Worthington v. Mt. Pleasant Tp., 212 A. 3d 582 (Pa. Cmwlth., June 6, 2019). Plaintiff appealed a trial court decision dismissing her appeal from township board's grant of a permit for gas development well and well pad. Plaintiff sought Commonwealth Court review to determine whether trial court erred in denying her party status and whether the denial rendered the township decision *void ab initio*. Plaintiff testified at the proceedings below that although she lived more than three miles from the proposed site, she was "representing her [grand]daughter" who attended school one mile from the site. The court held that standing for a conditional use adjudication requires "a substantial, direct and immediate" interest in the decision. Because plaintiff presented no legal support for a custody relationship with her granddaughter and held speculative concerns for the granddaughter's health, the denial of standing was appropriate.

Township of Robinson v. Esposito, 210 A.3d 1146 (Pa. Cmwlth., May 31, 2019). Appellant was found guilty of violating township zoning ordinance by magisterial district judge after receiving a "cease and desist" letter advising him that he had changed the use of his property in violation of "the Ordinances of the Township of Robinson," and a subsequent letter from the township solicitor indicating the township intended to file citations and that the appellant needed to apply for zoning approvals. The Court of Common Pleas dismissed appeal, directing him to either file new land use applications or appeal to the township zoning hearing board. Commonwealth Court reversed. The Municipalities Planning Code notice provisions relating to a zoning violation are subject to strict compliance. The letters sent to Appellant prior to the citations and seeking penalties were not addressed to the record owner, did not specify the sections of the ordinances that were violated, and did not set forth the appellant's procedural rights.

Circleville Road Partners, L.P. v. Township of Ferguson, 209 A.3d 1125 (Pa.Cmwlth., May 15, 2019). The Commonwealth Court upheld the trial court's conclusion that an ordinance made textual amendments to the zoning ordinance and was

not a map change. Developer sought to resume development of an older project that had been delayed due to changed market conditions. Thus, developer proposed changes to the approved traditional town development (TTD) master plan by submitting an application to the township in an effort to amend the zoning ordinance. The township provided public notice of the hearing on the application as required for a text amendment, but did not follow the notice requirements for a zoning map change. The township ultimately adopted the draft as an ordinance amending the zoning ordinance. Another developer (appellant) appealed to the trial court asserting, among other things, that the changes to the zoning ordinance changed the manner in which the developer's property is zoned in comparison to the adjacent tract of land owned by appellant, and that the changes were a map change without the required notice given under the MPC.

The Commonwealth Court noted that changes to a zoning ordinance defining standards used by the governing body to grant modifications from design elements of the TDD did not constitute a map change, since the changes did not change the nature of a mixed use district. The court further noted that changes that did not change the boundaries or size of the TTD, but that made adjustments to existing design and dimension standards, did not substantially change the nature of the district and thus the changes did not create a new zoning scheme. Moreover, changes to the zoning ordinance were applicable to all TTDs in a mixed use district and therefore were not so comprehensive as to result in a substantial change to a single tract of land as compared to other similarly situated properties in the mixed use district in regards to whether the new zoning ordinance constituted a textual or map change.

DeAngelo v. North Strabane Township Zoning Hearing Board, 208 A.3d 156 (Pa. Cmwlth., Apr. 17, 2019). Appellant landowners contend that Township zoning ordinance requirements that a medical clinic be permitted only where it is in conjunction with an existing life care community was impossible, and therefore impermissibly exclusive because no parcel in the zone was large enough to permissibly construct a life care facility. Commonwealth Court declined to reverse the Zoning Hearing Board's rejection of the Appellant's application for a variance from these requirements because the variance is not seeking a reasonable adjustment from the area and space requirements, but rather to advance an altogether separate use, which would be permissible in other zones of the Township.

Slice of Life, LLC v. Hamilton Township Zoning Hearing Board, 207 A.3d 886 (Pa., Apr. 26, 2019). Appellee landowners argued that ordinance limiting use for single-family residences should not prevent use of property for short-term transient rentals made available through internet based rental service. Supreme Court reviewed Commonwealth Court decision finding that full-time use for transient rentals is consistent with prior decisions permitting transient rentals of vacation homes rented out for transient use during part of the year where ordinance does not specifically bar rental use. Supreme Court reversed, finding that clear intent of single-family exclusive use should have been considered by Commonwealth Court and drawing distinction between property held only for transient rental and part-time rental properties.

Pensions

Ungard v. Williamsport Bureau of Police Pension Board, 210 A.3d 1121 (Pa. Cmwlth., May 30, 2019). Appellee was stripped of his police pension by Pension Board after conviction for tampering with public records or information, a crime listed in the Pennsylvania Employee Pension Forfeiture Act, Act 140 of 1978. Appellee, as coordinator of drug task force, conveyed seized vehicles to himself through a straw party and then falsified PennDOT documents for the transaction from the straw party to him. At a hearing before the Pension Board, the city employer introduced no evidence other than certified records from the criminal case. Appellee testified that the convictions resulted from his actions in a private capacity receiving the vehicles from the straw party. Appellee appealed forfeiture to the trial court which reversed, finding that the Board did not prove that the crimes were related to Appellee's public employment. Commonwealth Court agreed. The Court initially noted that pension forfeiture is disfavored and related laws are strictly construed. Furthermore, Appellee presented uncontroverted evidence that the crimes in question were committed in a private capacity.

Recording

MERSCORP, Inc. et al. v. Delaware County Recorder of Deeds, et al., 207 A.3d 855 (Pa., Apr. 26, 2019). Four appellant Pennsylvania County Recorders of Deeds in a consolidated appeal contest the practices of appellee's national electronic registry system for mortgage promissory notes, asserting that the system allows the appellee member banks to designate "nominee" records for member-to-member transfers of promissory notes without recording the instrument with the county recorder of deeds. Recorders argue that plain statutory language requiring that all such instruments "shall" be recorded in County Recorder of Deeds office constitutes a mandate consistent with precedent in the Commonwealth since at least 1715. The Court finds that the General Assembly did not create an enforcement mechanism for the mandate, and thus the language is instead directory instructions to interested parties to record the instrument if the parties wish to be protected by the benefits provided by recording.

Right-to-Know Law

Pysher v. Clinton Township Volunteer Fire Company, 209 A.3d 1116 (Pa.Cmwlth., May 8, 2019). A volunteer fire company is a local agency under the Right-to-Know Law. Both the Office of Open Records and the trial court determined that fire company is a local agency, but because the record lacked facts necessary for a review of the nature of relationship between fire company and township, the Commonwealth Court vacated the trial court's order and remanded for development of the record. On remand, evidence is to be produced relevant to the degree of governmental control township exercises over fire company, including fire company's organizational structure, purposes, powers, duties and fiscal affairs; whether the function the fire company performs is a substantial part of a government activity; and proportion of public to private funding the fire company receives.

[R]ecording a conveyance… is essentially a service purchasers and mortgage holders have a right to accept or decline. Although the Recorders emphasize a consequence of MERSCORP's failure to record is a loss by the Counties of attendant recording fees, there is nothing in Section 351 to support the conclusion that the purpose of recording is revenue generation…Moreover, a failure to record results in a clear consequence – the mortgagee runs the risk of losing its status and being deprived of property rights – and a party that chooses not to record … does so at its own peril. An additional penalty for failing to record is beside the point.

- MERSCORP, Inc. v. Delaware County

Finnerty v. Pennsylvania Department of Community and Economic Development, 208 A.3d 178 (Pa. Cmwlth., Apr. 25, 2019). Appellant law firm challenged the Department of Community and Economic Development's (DCED) decision to withhold or redact certain records under "internal predecisional deliberations" exception to the Right-to-Know Law on the basis that the records, prepared by a subcontractor advising the contracted coordinator appointed under the Municipalities Financial Recovery Act, could not be found to be internal to DCED as the records were not internal to the agency. Commonwealth Court affirmed the finding of the Office of Open Records that because the records were prepared to assist the appointed coordinator in the exercise of its statutory duty to address the distressed municipality's financial problems, and for which the coordinator and DCED needed to rely on a 'frank exchange of ideas' with additional consultants, the purpose of the exception was served by its application on the records.

Streets and Roads

Schnarrs v. Rush Tp. Bd. of Supervisors, 210 A. 3d 1161 (Pa. Cmwlth., May 31, 2019). Appellants brought trespass action against township for use of paved area connecting parallel streets adjacent to property. The township filed a counterclaim seeking a declaration that paved area was a public road. The trial court concluded that the township acquired a prescriptive easement and that township's use of paved area did not constitute trespass. The Commonwealth Court agreed. Although the trial court appeared to have conflated proof of a public road under the Second Class Township Code with a prescriptive easement analysis, Commonwealth Court held that an easement, nevertheless, existed. Interestingly, the court noted "parenthetically" that the trial court conducted an eminent domain analysis, but only as to previous owners, and that nothing precluded the current appellants from pursuing eminent domain remedies under the current facts.