LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 3, 2020

Greetings from the Director: Notwithstanding all of the issues facing municipalities we are watching as a result of the COVID-19 pandemic, a variety of matters significant to local government continue to be decided by our appellate courts. Our latest compilation of cases of interest handed down over the past few months includes decisions on employment and social media, municipal contracting and, yes, pet chickens. In addition, we have provided you some bill numbers of relevant legislation enacted or in process. Look for our next edition in the Fall. In the meantime, we here at the Commission wish everyone safe and enjoyable dog days.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

Act 15 of 2020 amends Titles 35 and 42 of the Pennsylvania Consolidated Statutes to authorize emergency procedures during the COVID-19 disaster emergency by permitting local governments to extend the deadlines for property tax discount rates and authorizing political subdivisions to conduct business through the use of authorized telecommunications device.

HB 2536, PN 3813 amends the Local Government Unit Debt Act to allow local government units to issue special short term debt to help manage cash flow during the Covid-19 emergency. Unanimously passed the House on June 23, 2020.

Act 75 of 2020 amends the Local Tax Collection Law, authorizing the board of school directors to extend the deadlines for property tax discount rates and/or waive any fee or penalty for late payments of property taxes for the school year that begins July 1, 2020, as provided.

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Civil Rights

Associated Builders and Contractors Eastern Penna Ch. Inc, et al. v. Plymouth Township, 808 Fed. Appx. 86 (3rd Cir., April 6, 2020). Appellant construction organization contended that Appellee township's Responsible Contractor Ordinance (RCO) discriminated against non-union contractors because the apprentice program required by the ordinance correlates strongly with area union practice. In its appeal the construction organization believed that the Township had violated the Equal Protection Clause of the 14th Amendment because there is no rational basis for excluding contractors who do not participate in the apprentice program. The township identified two reasons for the RCO requirement: first, that compliance with the RCO required apprentice program increases the likelihood that well trained workforce will provide quality workmanship and second, that requiring the apprenticeship program would promote the apprenticeship program to other contractors who would seek to participate in future projects. Finding that the Appellant's rebuttals to the township's reasoning failed to demonstrate that the township could have no conceivable rational basis for the regulation, the Third Circuit affirmed.

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (June 15, 2020). This case was a consolidation of three actions under Title VII of the Civil Rights Act of 1964. In first, gay county employee sued employer alleging sexual orientation discrimination in termination of employment despite the county

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.

receiving awards related to the employee's work after the employee joined a recreational gay softball league. In second, employee mentioned he was gay and was fired within days after making the statement. In third, EEOC brought action against employer, alleging that employer fired transitioning, transgender employee based on gender stereotypes. The Court determined that an employer violates Title VII when it intentionally fires an individual employee based in part on sex.

Emergency Services

In Re Merger of Universal Volunteer Fire Department into Point Breeze Volunteer Fire Association, 2020 WL 3549886 (Pa. Cmwlth., July 1, 2020). Subject municipality received a substantial bequest from a decedent on behalf of the Universal Volunteer Fire Department. The gift expressly related to the decedent's long family history with Universal. After the municipality revoked the fire service territory of Universal, Universal sought to merge with another volunteer fire department, and continue service in its prior territory. The municipality, instead, sought to utilize the decedent's bequest to benefit the fire service which had been granted Universal's prior service territory under the doctrine of *cy pres* under the belief that Universal could no longer achieve its original charitable purpose. After the Orphan's Court approved Universal's merger and declined to approve the disposition of assets under *cy pres*, the appellant fire departments which now served Universal's former territory contended to Commonwealth Court that they now fulfill the charitable Universal's stated charitable purposes, and should be the beneficiary of the decedent's bequest. Finding that Universal, in its now merged capacity, could eventually obtain firefighting territory in the future, and that the decedent would have been aware of its other charitable purposes, the Court held that the doctrine of *cy pres* did not apply, and the decedent's gift in trust should not be extended to the appellant fire departments.

Government Accountability

D.A. Nolt, Inc. v. Philadelphia Municipal Authority, et al., 2020 WL 2797302 (E.D. Pa., May 28, 2020). District Court heard a dispute over the amount of liquidated damages which can be assessed against a contractor for a delay in a construction project. Although liquidated damages were pre-set in contract at an amount of $10,000 per diem, this amount was ten times higher than the standard contract terms utilized by the City for contracts of comparable size. Construction company moved for summary judgment on the basis that all evidence presented demonstrated that the City, through its authority, failed to base its liquidated damages provision on a good faith estimate of its actual damages. The court found that the employee who testified as to the method of setting the liquidated damages number failed to make any forecast of actual cost to the city on a daily basis, compared liquidated damages provisions for projects that were $70-$100 million projects compared to the under $14 million project at issue, and compared a project that was for a 20 year old correctional facility that included in its liquidated damage estimate the cost of rehousing inmates. Thus, the city's per diem provision was not based on a reasonable forecast of estimated actual damages and is unenforceable.

Land Use

Allen Distribution v. West Pennsboro Township Zoning Hearing Board, 2020 WL 2312348, (Pa. Cmwlth., May 11, 2020). The trial court affirmed the zoning hearing board's decision that a township ordinance rezoning two parcels of land from high density residential to industrial was invalid as spot zoning. Commonwealth Court affirmed the trial court's decision.
The equitable owner (Owner) of the parcels in question asserted that the property's size, about 133 acres total, fit in with other industrial-zoned properties in the vicinity and, therefore, was not a "spot" in the overall zoning map. Owner also contended that the industrial zoning of the property blended in with the surrounding uses and that it was an abuse of discretion for the ZHB to ignore the proximity of the property to the infrastructure development in the highway corridor and a large industrial warehouse complex located across the street. Notably, however, despite the township comprehensive plan designating additional properties for industrial or commercial zoning, only the parcels at issue were rezoned.

Although the rezoning was in conformance with the township comprehensive plan with respect to the parcels, the re-

zoning was not in conformance with the township comprehensive plan *for the community*. Thus, the court found no error or abuse of discretion in the ZHB's determination that the ordinance unjustifiably, arbitrarily, and unreasonably singled-out land for treatment different than similar surrounding land of the same character for the economic benefit of the equitable owner. Consequently, the ordinance constituted spot zoning and was invalid.

Fask v. Zoning Hearing Board of the Township of Haverford, 2020 WL 2394916, (Pa. Cmwlth., May 12, 2020). (UNREPORTED; See 210 Pa. Code § 69.414). Appellants, one of whom practiced as a clinical psychologist, argued that the trial court erred in affirming the zoning hearing board's decision imposing restrictions on the days and hours of the practice from their home. The home was located in a low-density residential district where professional offices are permitted by special exception. Appellant asserted that the ZHB abused its discretion by imposing a condition that unreasonably restricted the practice in the absence of any evidentiary support. On appeal, the Commonwealth Court agreed.

Commonwealth Court determined that the record before the ZHB included only speculative concerns expressed by neighboring residents that did not suffice as substantial evidence. One of the concerns expressed was the type of cases that may be treated despite Appellant's testimony that he would not treat any patients with severe psychopathology. Consequently, Commonwealth Court held the ZHB unreasonably restricted the days and hours of Appellant's practice, and the trial court erred in affirming the ZHB's decision in that regard.

Dechert LLP v. Pennsylvania Department of Community and Economic Development, 2020 WL 3421689 (Pa. Cmwlth., June 23, 2020). Petitioner challenged the Department of Community and Economic Development's (DCED) construction of the Keystone Opportunity Zone, Keystone Opportunity Expansion Zone and Keystone Opportunity Improvement Zone Act (KOZ Act) which prohibited moving business from an expired zone into an active zone. Petitioner enjoyed almost 15 years of tax benefits as a tenant in expired zone and sought benefits in active zone but was denied by DCED letter ruling. Commonwealth Court, disposing of the legal question through original jurisdiction, held that the plain language of the KOZ Act permitted tax benefits following relocation from outside of active zone upon satisfying a closed set of criteria notwithstanding DCED's argument that "zone hopping" would frustrate the intent of the act.

Sabatini v. Zoning Hearing Board of Fayette County, 2020 WL 1969466 (Pa. Cmwlth., April 24, 2020). Petitioner appealed trial court order affirming county zoning board order which denied his petition requesting the Board to reverse enforcement against keeping agricultural animals on property that is zoned residential. The Commonwealth Court reversed. Petitioner had eighteen pet chickens, and never advertised for sale chicken eggs, meat, or feathers, and that he never sold, butchered, or ate any of the chickens. Because the activity was not commercial in nature, when interpreting the ordinance in favor of the landowner and in accordance with the plain meaning of undefined terms, it did not fit the definition of the impermissible use of "agriculture" in the residential district.

Martin v. Zoning Hearing Board of West Vincent, 2020 WL 2050711 (Pa. Cmwlth., April 29, 2020). After citation for violating township zoning ordinance, landowners negotiated with township solicitor who agreed to extend the deadline for filing an appeal to the zoning hearing board. Landowners appealed from court order sustaining appeal by intervenors who successfully argued that enforcement order against landowners was binding and unassailable because of landowners' untimely appeal. The Commonwealth Court agreed and quashed the appeal, vacated the trial court decision, and remanded with instructions to vacate the zoning hearing board's order. The Court determined that because the township solicitor was not cloaked with the apparent authority to extend the deadline and landowners were represented by counsel, landowners could not reasonably rely on the representation to extend the deadline and all adjudication of the enforcement notice was improper.

William F. Goodrich, et al v. The City of Pittsburgh Zoning Bd. of Adjustment, & City of Pittsburgh, & Three Rivers Youth Appeal of: Three Rivers Youth, No. 847 C.D. 2019, 2020 WL 1870278 (Pa. Cmwlth., Apr. 15, 2020). Property owner appealed decision of trial court, reversing the Zoning Board decision granting

property owner's application for special exemption. Commonwealth Court affirmed lower court's ruling. Appellant owned two adjacent homes in a residential zone, and applied for a special exemption to use the homes as transitional housing for adults recovering from addiction, including some residents recently released from incarceration. The Zoning Board granted the exemption, and upon appeal the trial court reversed the decision, finding that the property owner failed to establish property use as "community home" and did not meet criteria for special exemption. Trial court found no evidence that residents of the home operated as a "single housekeeping unit" and were transient in nature. Further, the Zoning Code's definition of community home expressly excludes transitional housing for those leaving a correctional facility. Therefore, Commonwealth Court affirmed trial court's decision.

It makes no difference if other factors besides the plaintiff's sex contributed to the decision… Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.

- Bostock v. Clayton County, Georgia.

Municipal Services

J. Buchanan Associates, LLC v. University Area Joint Authority, 2020 WL 2508032, (Pa. Cmwlth., May 13, 2020). Owner of an office building submitted an application to connect the owner's 20,260 square foot building to the municipal authority's sanitary sewer system. The Authority charged Owner a $32,977 tapping fee ($4,711 of which was the capacity part of tapping set forth in a rate resolution times 7 EDUs). Owner paid the fee under protest and connected to the system.

Owner argued that the tapping fees were improperly expressed as EDUs and were excessive, in violation of the express provisions of the MAA, as amended by Act 57 of 2003, specifically in section 5607(d)(24)(i)(C)(I)-(II) and (VII). Owner argued that the Authority should calculate tapping fees on the basis of anticipated or actual flow rates as opposed to the arbitrary number of EDUs assessed. Owner asserted that a new customer's tapping fee must be limited to the customer's proportionate gallons per day requirements (i.e., its "design capacity").

The court concluded that, when read in context of the section in which it appears, the phrase "may not be expressed" in section 5607(d)(24)(i)(C)(VII), was intended to mean that design capacity may not be expressed in terms of EDUs when determining the capacity and collection parts of the tapping fee. When determining the capacity part of the tapping fee, a municipal authority's cost per unit is multiplied by the new customer's "required number of units of design capacity." Design capacity must obviously be expressed in some type of measurement or "unit." The disputed language simply requires that the number of units of design capacity in the calculation of the capacity part (and collection part) not be expressed in EDUs. This is because an artificially reduced tapping fee would result if the authority's costs per unit are multiplied by EDUs. If EDUs were used as the multiplier in the tapping fee equation, there would be no way to ensure that the new customer is not being charged more per unit than the authority's cost per unit of providing the required service.

The EDU method of charging tapping fees employed by the Authority anticipates each commercial property's wastewater needs based on the type of building and the character of its use. After computing the component parts of the residential tapping fee in accordance with the MAA, the Authority assessed the property at seven EDUs.

The court noted that the purpose of section 5607(d)(24)(ii), to ensure that the public has a basis to evaluate the accuracy of the tapping fees, was accomplished. Thus, the fact that the Authority did not charge Owner's tapping fee based on its

actual water flow needs did not establish that the fee was unreasonable. Therefore, the court found that the trial court did not err in dismissing this count for failure to state a claim against the Authority.

Police Power

Interest of D.R., 2020 WL 3240581 (Pa., June 16, 2020). County children and youth services filed motion to compel parents' cooperation with protective services assessment. The court of common pleas ordered parents to permit agency into their home to assess living conditions of children and ordered father to submit observed urine samples for purposes of drug and alcohol assessments. Parents appealed. The Superior Court reversed. Parties filed cross petitions for allowance of appeal, and agency's petition was granted. The Pennsylvania Supreme Court held that authority of agency to investigate suspected child abuse does not include authority to obtain involuntary urine sample from subject of investigation. Judgment of Superior Court affirmed.

Public Employment

Pennsylvania State Corrections Officers Association v. Commonwealth, 2020 WL 3549892 (Pa. Cmwlth., July 1, 2020). Appellant Corrections Officer Association appealed an arbitrator's award where the arbitrator found that a corrections officer who was injured while helping a coworker and climbing the steps to enter the correctional facility prior to the beginning of his shift was not entitled to an award because the injury did not occur during the performance of the officer's duties. Although the Commonwealth Court finds that the injury occurred in a similar fashion as prior arbitrations that had found that whether the injuries occurring immediately prior to the commencement of an officer's duties were or were not in the course of the officer's duties turned on how those cases evaluated a corrections or police officer's availability to assist in an emergency response prior to clocking-in for a shift. Here, the association could argue the officer's availability to assist in such an emergency, but the arbitrator found the argument too hypothetical to be determinative. Because of the deferential nature of the appeal from the arbitrator's award, the Commonwealth Court affirmed.

Carr v. Department of Transportation, 2020 WL 2532232 (Pa., May 19, 2020). Probationary department employee, deriding the skills of a school bus driver, posted a "rant" on a closed Facebook group suggesting that she would "gladly smash into a school bus." Given that her employment was known to the group, members complained to the department and she was terminated for inappropriate behavior. The State Civil Service Commission affirmed the department's termination, finding that it did not infringe on employee's Free Speech rights because her comments were not in the "public interest," and, even if they were, any interest was outweighed by the damage to the department's public safety mission. A unanimous panel of the Commonwealth Court reversed, holding that her comments were in the public interest, and the inquiry moved to whether the department was justified in treating her differently than a member of the general public. After weighing the factors set forth in the Pennsylvania Supreme Court's decision in *Sacks v. Dep't of Pub. Welfare*, 502 Pa. 201, 465 A.2d 981 (1983), Commonwealth Court concluded "[the] department's generalized interest in the safety of the traveling public does not outweigh [employee's] specific interest in commenting on the safety of a particular bus driver." The panel reversed and remanded with instruction to reinstate the employee. The Pennsylvania Supreme Court reversed, holding that Commonwealth Court did not weigh the "public importance" of the speech as is required under *Sacks*. Finding the speech to be a "rant based on a personal observation of a . . . driver" and thus of limited public importance, the Court held the speech did not outweigh the detrimental effect to the Department.

Northern Berks Regional Police Commission v. Berks County Fraternal Order of Police, Lodge #71, 2020 WL 2529056 (Pa., May 19, 2020). Officer was dismissed for, among other things, saving and printing photographs from the Pennsylvania Judicial Network ("JNET") for no lawful law enforcement purpose. Upon a subsequent arbitration, union argued that officer's dismissal was disproportionate to a suspension handed down to another officer for more significant similar violations and the arbitrator agreed, reinstating officer. Police Commission appealed to the court of common pleas, arguing that termination of access to JNET, which occurred after employment termination but prior to arbitration, required the Police Commission to do an "illegal act," because officer could not

be employed as a police officer without access to JNET. The trial court agreed, holding that putting officer back to work would require either restoring his JNET access or having another officer provide him JNET information, both of which are not permitted by law. Although the Commonwealth Court agreed that JNET access was required for officer to do his job, it, nevertheless, vacated the trial order because officer was pursuing administrative remedies to restore JNET access. The Commonwealth Court remanded the matter to the trial court with instructions to stay proceedings "until all avenues of relief were exhausted," at which time the trial court "may then consider the question of whether the Commission can implement the award without violating the law." The Pennsylvania Supreme Court reversed and remanded with instructions to reinstate the arbitrator's award. The Court noted that the Commission's petition to vacate the arbitrator's award filed with the trial court was based entirely upon factual developments post-dating termination. Furthermore, the Commission had the option of reinstating officer per the award and dismissing him for not having JNET access. The Commonwealth Court erroneously reversed the decision of the trial court pending upon the results of officer's attempts to gain access to JNET, essentially deciding the case on facts not before the arbitrator. Finally, the Court held that the issue of a "public policy" exception to narrow certiorari scope of review used in Act 111 matters was waived by the Police Commission.

Bristol Township v. Pennsylvania Labor Relations Board, 2020 WL 1969467 (Pa. Cmwlth., April 24, 2020). Township petitioned final order of Board which affirmed the Board Secretary's (Secretary) dismissal of the Township's petition for decertification seeking to decertify the Transportation Workers Union of America, Local No. 282 (Union). The petition for decertification required the employer to assert "a good faith doubt of the majority status of the present representative," with factual support. The petition explained that there was a single, nonprofessional employee in the Union. Thus, the Township alleged that "as of August 24, 2018, the number of employees in the [Union] was reduced to one (1)" and "[o]ne employee cannot form a lawful bargaining unit in Pennsylvania." The Commonwealth Court affirmed, finding that it could not ignore facial substantive defects in the petition notwithstanding the merits of whether the Township had any duty to bargain with the Union.

Taxation and Finance

Tolo Properties, LLC v. Stewart, 2020 WL 2314980, (Pa. Cmwlth., May 11, 2020). (UNREPORTED; See 210 Pa. Code § 69.414). Appellant appealed from the trial court's order that dismissed the petition for the appointment of a conservator pursuant to the Abandoned and Blighted Property Conservatorship Act (Act 135 of 2008). The trial court dismissed the petition without a hearing because Appellant failed to establish the property falls under the definition of a "building" under the Act. The property was an abandoned vacant lot although it previously contained a building that was demolished.

Section 3 of the Act defines "building" as "[a] residential, commercial or industrial building or structure and the land appurtenant thereto, including a vacant lot on which a building has been demolished."

The Commonwealth Court explained that the only way to give effect to the phrase "including a vacant lot on which a building has been demolished," is to treat it as a separate category of property encompassed under the Act's definition of "building." To determine otherwise would render the phrase redundant to the directly preceding phrase "and the land appurtenant thereto."

The court concluded that the intent of the General Assembly to expand the definition of "building" to include vacant lots where previously standing buildings have been demolished is evidenced from reviewing fiscal notes from both the House and Senate Appropriation Committees ("[t]he legislation does the following: ... Adds vacant lots on which buildings have been demolished to the definition of 'building.' ") and ("House Bill 1363 expands the existing definition of 'building' to include a vacant lot on which a building has been demolished.").

Since the Petition alleged that the property was a vacant, abandoned lot that once contained a building that has been demolished, and if proven, would suffice to qualify the Property as a building subject to the appointment of a conservator under the Act, the trial court erred in dismissing the matter without a hearing. Reversed and remanded.