LOCAL GOVERNMENT COMMISSION
Quarterly Legal Update

Issue 3, 2021

Greetings from the Director:

Happy Holidays to everyone from the Commission staff! This is a more giant-sized edition of our round up of cases relevant to municipal law and includes fascinating and momentous 2021 decisions involving violations of Second Amendment rights in municipal enactments, recreational events on public property, and eminent domain jurisprudence from the U.S. Supreme Court. As usual, we also bring you some local government bills moving in the General Assembly. We wish all of our readers a safe, happy, and prosperous 2022.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

SB 479, PN 504: Amends the Municipalities Financial Recovery Act, or "Act 47," to specify additional ethical compliance requirements for the appointees, recovery coordinators and receiver, who work directly with financially distressed municipalities on behalf of the Department of Community and Economic Development (DCED). *See also HB 1171.* SB 479 passed the Senate on June 7, 2021. Given first consideration by the House on September 29, 2021.

Continued on page 7 >>

Keep up with the latest from the Local Government Commission:
@PA_LGC
www.lgc.state.pa.us

Civil Rights

Fulton vs. City of Philadelphia, 141 S.Ct. 1868 (June 17, 2021). A religious foster care agency brought a civil rights action against the city after the city refused to contract with the agency over its policy not to certify same-sex couples as eligible for the placement of children. The city asserted its decision not to renew was due to its non-discrimination policy, which was applied, in this instance, at the discretion of the commissioner directing the referrals to eligible foster care agencies. Thus, the Court was unable to assess the policy according to the *Smith* test because the policy could not be considered a "neutrally" applied policy that impacted free practice. The agency was faced with the choice between continuing to pursue its mission or violating its religious beliefs if it was not granted an exemption from the policy. Where the government fails to act neutrally, the government's actions are subject to strict scrutiny under the Free Exercise Clause. Here the city could not refuse to grant an exemption from its non-discrimination policy without a compelling reason.

Drummond v. Robinson Township, 9 F.4th 217 (3d. Circ., Aug. 17, 2021). In this case the 3rd Circuit dipped a tentative toe into the question as to whether there are Second Amendment rights implicated in land use decisions surrounding the operation of a shooting range. Appellee Township sought to limit shooting activity within a zoning district to clubs owned by a non-profit corporation and authorizing only the use of lower powered rim-fire rifles. Reversing the trial court's decision to dismiss the Appellant club's claims that these regulations infringed on the club's Second Amendment rights, the court here, recognized in a case of first impression, the relevance of Second Amendment rights to the club's objections to the zoning district amendment. The court applied *United States v. Marzzarella* to determine whether the regulations at issue resemble historical "exceptions to the Second Amendment guarantee." Because neither regulation bears a significant resemblance to historically recognized regulations of firearms, the court asserted that the Township's regulations should be subject to a higher degree of scrutiny, but because

the rights at issue are not related to the core right of self-defense in the home, intermediate scrutiny rather than strict scrutiny should be applied by the trial court on remand.

Eminent Domain

Cedar Point Nursery v. Hassid, 141 S.Ct. 2063 (June 23, 2021). A California regulation granted labor organizations a "right to take access" to an agricultural employer's property to solicit support for unionization for up to three hours per day, 120 days per year. Union organizers sought to take access to property owned by two California growers, including plaintiff. The growers filed a federal suit seeking to enjoin enforcement of the access regulation on the grounds that it appropriated, without compensation an easement for union organizers to enter their property and therefore constituted an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments. The District Court dismissed the complaint holding that the access regulation did not constitute a *per se* physical taking because it did not allow the public to access the growers' property in a "permanent and continuous" manner. A divided panel of the Court of Appeals for the Ninth Circuit affirmed. In a 6-3 decision, Supreme Court reversed, holding that the regulation appropriated the owners' "right to exclude," and constituted a "*per se* physical taking" subject to just compensation and not a regulatory taking subject to the fact-intensive *Penn Central* balancing test.

The majority rejected as "unfounded" the concern of the dissent that the breadth of the decision risks making temporary or regulatory occupation of property takings. The majority dismissed this concern, noting that trespass law was not affected, lawful arrests remain authorized, and the government may require access as a condition of receiving permits and licenses.

In re Powell, 2021 WL 2793374 (Pa. Cmwlth., July 6, 2021). Appellant landowner contested an Authority's power to condemn property for the purpose of installing a powerline to provide electric service to new ambulance station under construction. Commonwealth Court held that the strict construction of the Municipal Authorities Act does not grant Authority power to condemn for the erection of an electric power line, but rather explicitly refers to facilities for generating electric power. (53 Pa.C.S. §5607(a)(12)). Further, the court found that the description of the property in the declaration failed to sufficiently identify which portion of the property would be condemned.

Government Accountability

Gera v. Borough of Frackville, 2021 WL 1573834 (Pa. Cmwlth., April 22, 2021). Gera (Requester) filed a Right-To-Know Law (RTKL) request with the Borough seeking, among other things, all records on two individuals concerning any and all investigations, communications, records, reports, etc. by the police department; and all records concerning "any and all investigations, communications, records, reports, etc." on Requester. Through police chief affidavit, the Borough acknowledged that records existed, but denied these requests because the investigation is ongoing. On appeal, the Office of Open Records transferred the appeal to the appeals officer in the District Attorney's office of the county, who denied the requests. The trial court granted the Borough's motion to dismiss, holding that the police chief's affidavit was sufficient evidence under RTKL. On appeal to Commonwealth Court, the court affirmed the trial court's determination that the affidavit was sufficient. "The affidavits must be detailed, nonconclusory, and submitted in good faith…. Absent evidence of bad faith, the veracity of an

The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless [of] whether any exceptions have been given, because it "invite[s]" the government to decide which reasons for not complying with the policy are worthy of solicitude… - here, at the Commissioner's "sole discretion."

- Fulton v. City of Philadelphia

agency's submissions explaining the reasons for nondisclosure should not be questioned." Commonwealth Court further stated that the criminal investigation exemption in Section 708(b)(16) does not distinguish between ongoing and completed criminal investigations, nor does that Section require the investigation to culminate in a citation or arrest.

Wise v. Huntingdon County Housing Development Corporation, 249 A.3d 506 (Pa., April 28, 2021). Appellant pedestrian brought personal injury action against public housing entities after she fell and was injured walking on sidewalk at night, claiming insufficient outdoor lighting in the area created a dangerous condition. Trial court granted summary judgment in favor of housing entities' claim of sovereign immunity; Commonwealth Court affirmed, holding that Wise's complaint was, in actuality, that "the Commonwealth failed to alter the natural state of nighttime darkness," and, thus, no defect in Commonwealth realty caused her fall. Supreme Court reversed, holding that Appellant's claim of a dangerous condition (inadequate outdoor lighting) resulting from a "defect in the property or in its construction, maintenance, repair, or design" was sufficient to invoke the real estate exception to sovereign immunity, and remanded for further proceedings.

Chester Water Authority v. Pennsylvania Department of Community and Economic Development, 249 A.3d 1106 (Pa., April 29, 2021). Appellant Water Authority sought documents related to the recovery of the City of Chester prepared and exchanged by the Department and consultants retained by the Department to provide managerial, legal, and financial services related to the City's recovery. In its administrative findings, the Office of Open Records, as affirmed by the Commonwealth Court, sought to extend the Right-to-Know Law's exception that protects from disclosure internal records concerning an agency's pre-decision deliberations to communications exchanged between the agency and its consultants – essentially adopting the "consultant corollary" recognized under the Federal Freedom of Information Act exception recognized by several Federal Circuits. Without rejecting the underlying value of such a principle – that an agency may need consultant expertise to inform a decision – the Supreme Court reversed the Commonwealth Court regarding the extension of the exception beyond the agency's internal deliberations on the basis that the General Assembly could broaden the exception if that had been its intent, and has not done so.

Degliomini v. ESM Productions, Inc., 2021 WL 2546382 (Pa., June 22, 2021). Cyclist signing a blanket exculpatory contract (Release) holding City harmless and then participating in charity event fell into unmarked and un-barricaded sinkhole which had been previously paved over without any remediation of the underlying sinkhole condition. The trial court held that Political Subdivision Tort Claims Act (PSTCA) excepted immunity in cases of defective conditions of streets, that City had actual or constructive notice of the condition, and, under the Home Rule Charter, City had a mandatory duty to maintain and repair City streets. The court thereby concluded the Release was not valid as it violated public policy by exculpating the City from liability for conduct that breaches its exclusive duty to the public set forth in the Home Rule Charter. The Commonwealth Court reversed, observing that Pennsylvania courts have consistently upheld exculpatory releases pertaining to recreational activities as non-violative of public policy. The PA

The Ninth Circuit saw matters differently, [and] took the view that the access regulation did not qualify as a per se taking because it does not allow for permanent and continuous access '24 hours a day, 365 days a year.' . . . That position is insupportable as a matter of precedent and common sense. There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.

- Cedar Point Nursery v. Hassid

Supreme Court reversed, holding that maintenance and repair of streets was an "essential public function," and both common law and the home rule charter imposed an affirmative, non-waivable duty on the City.

Mountz v. Columbia Borough, 260 A.3d 1046 (Pa. Cmwlth., July 13, 2021). Borough executed an agreement to purchase property (Property). The agreement gave the Borough 90 days to conduct an environmental study of the Property and the right to cancel the agreement without penalty should the environmental studies not be satisfactory to the Borough, in its sole discretion.

Borough engaged the services of an engineering company to prepare two environmental studies of the Property. Prior to the expiration of the 90-day period, Borough voided the agreement and demanded the return of its deposit. Requester filed a Right-to-Know Law (RTKL) request for environmental site assessment reports on the Property. The Borough denied the request. Requester appealed and the Office of Open Records (OOR) directed Borough to disclose the environmental reports to Requester. Borough appealed to the trial court, arguing that the environmental study contingency in the sales agreement made clear that in the event any environmental report is unsatisfactory to the Borough, it "*may, in its sole discretion, void this Agreement within 90 days after the Execution Date*."

The trial court agreed with the Borough and reversed OOR's determination. The court held that the environmental site assessment documents were exempt from disclosure under Section 708(b)(22) of the RTKL, which exempts from disclosure certain documents related to real estate acquisitions, unless a "decision to proceed" with the acquisition is made. The trial court found the statute ambiguous because it does not define what constitutes a "decision to proceed" with an acquisition of real property. The court held that a decision to proceed takes place only "when all contingencies are met or the time to void the contract expires."

Commonwealth Court affirmed, holding that the government may take steps to ensure that upon receiving satisfactory environmental reviews, its "decision ... to proceed with the ... acquisition ... of real property" will be enforceable. The purchase need not be finalized. However, the parties must be past the point in time that the sales agreement can be voided without penalty to the buyer. That point in time did not occur here.

Land Use

Dipal Corporation v. Chartiers Township Zoning Hearing Bd., 2021 WL 3438863 (Pa. Cmwlth., Aug. 6, 2021). Appellant began operating his businesses when the property was zoned "C-1," allowing commercial uses. The area has since been rezoned as "R-2," a residential designation. Appellant's use predated the zoning change, as such Appellant lawfully operates as a nonconforming use.

Appellant wished to expand his convenience store to include the sale of beer and wine, and it accordingly sought and received approval from the Pennsylvania Liquor Control Board (PLCB) to sell beer and wine under the same liquor license that it uses for his other business, located in the other portion of the building housing Appellant's convenience store. However, a condition of that approval was that Appellant add seating for at least 30 people within the convenience store. After adding interior seating, Appellant was informed that the expansion of its use was improper. Appellant appealed and applied for an expansion of his lawful nonconforming use. The Zoning Board (Board) denied the application, concluding that the proposed use of an eating establishment and seating area within the convenience store is not a "natural and reasonable expansion" of an existing nonconforming use. Appellant appealed and the trial court affirmed the Board.

On appeal to Commonwealth Court, the court noted that it has previously found that a property owner seeking to expand its nonconforming use bears the burden to prove the existence of a prior nonconforming use by showing an actual use that was created in good faith and that previously existed lawfully. Moreover, the court noted that the PA Supreme Court has "never questioned the right of a municipality to impose reasonable restrictions on the expansion of a non-conforming use."

Here, the court found that Appellant did indeed present evidence to support its position that the addition of the seating area inside the convenience store was a natural and reasonable expansion of its existing nonconforming use. However, the court held that the record is devoid of evidence to the

contrary -- that the record fails to support the Board's concerns regarding increased patron activity, increased parking requirements and the like, and, regardless, these grievances would pose no discernable obstacle under the governing precedent of reasonable expansion of a nonconforming use.

Municipal and Tax Claims

City of Philadelphia v. Zig Zag, LLC, 256 A.3d 496 (Pa. Cmwlth., May 3, 2021).** Appellant sought review of a trial court order denying its motion to set aside the sale of a property that had been sold at sheriff sale for unpaid real estate taxes. Appellant asserted that the trial court had not required the City to establish by record that strict compliance with the procedural and notification requirements of the Municipal Claim and Tax Lien Law had been complied with by the City prior to the City seeking approval to hold the sale. The trial court denied appellant's motion to set aside the sale without holding a hearing, instead relying on the appellant's failure to appear at an earlier hearing as waiver that any failure of due process had occurred. Commonwealth Court reversed, reasoning that the trial court could not rely on the previous hearing alone and treat the issue as waived because in the absence of the property owner, it had the obligation to inquire of the City whether the City had strictly complied with its notification obligations under the statute. Having failed to do so and failing to allow the appellant to submit evidence at a later hearing pursuant to the motion to set aside the sale contesting the contents of the City's sale petition or the City's compliance with its notification requirements, the trial court warranted reversal and the sale must be set aside.

In re Sale of Real Estate by Lackawanna County Tax Claim Bureau, 255 A.3d 619 (Pa. Cmwlth., May 10, 2021). Owner of property subject to judicial sale petitioned to set aside tax sale due to defective notice. Trial court held that the petition to set aside the tax sale was time-barred. Commonwealth Court found that the Tax Claim Bureau's failure to achieve strict compliance with the service requirements for a judicial sale deprived the trial court jurisdiction to approve the sale, *and* that the trial court failed to conduct an "independent inquiry" into the service to confirm that it had jurisdiction. Consequently, notwithstanding the fact that the owner's petition was filed several months after the expiration of the six-month statute of limitations to contest the sale, the Commonwealth Court held that the jurisdictional defect rendered the sale *void ab initio*.

Municipal Boundary Changes

Woodward Tp. v. Dunnstable Tp., 2021 WL 1897690 (Pa. Cmwlth., May 12, 2021). Dunnstable appealed from a trial court order confirming the decision of the board of boundary commissioners, which found by a vote of two-to-one in favor

> *In furtherance of the [PSTCA's] expression of policy to protect the public fisc by limiting municipalities' exposure to liability, for instances where immunity is waived, the General Assembly provided a statutory cap on the amount of damages recoverable, defined the circumstances under which damages shall be recoverable, authorized local agencies to purchase or administer liability insurance, and prescribed permissible payment planning for judgments not fully indemnified by insurance. What the General Assembly did not provide, however, is a mechanism for a municipality to immunize itself, through exculpatory contracts or any other means.*
>
> *- Degliomini v. ESM Productions, Inc.*

of Woodward that the boundary line advocated by Woodward reflected the proper location of the boundary between the two townships. On appeal, Dunnstable asserted that "1. the commissioners erred by failing to recognize . . . monuments which Dunnstable [asserted] take precedence over any other description or source, 2. Woodward . . . was attempting to illegally "annex" a . . . portion of Dunnstable . . . which would require a referendum, 3. [a prior description] of the change in boundary line . . . had bearings and distances consistent with the findings of the [Dunnstable] Survey[, and; 4. the] commissioners failed to take into consideration evidence of acquiescence." Commonwealth Court held that the first and third arguments of Dunnstable are addressed to weight and credibility of the evidence, which are inconsequential once it is determined that credible evidence exists to support the commissioners' determination. The court also held that although boundary "determination" could be abused to effectuate an annexation, so long as the procedure is to ascertain and not alter, no such argument could be sustained. Lastly, the application of the "doctrine of acquiescence" as discussed in *Adams Tp. v. Richland Tp.*, 154 A.3d 250 (Pa. 2017) was not mandated where the commissioners could ascertain the true line.

Police Power

Barris v. Stroud Tp., 2021 WL 2177376 (Pa. Cmwlth., May 28, 2021). Petitioner challenged an ordinance restricting the discharge of firearms except at shooting ranges in locations consistent with the zoning ordinance or pursuant to other exceptions. A zoning application was denied for a variety of reasons, including zone location, but rather than appeal the decision, Petitioner brought a 2nd Amendment constitutional claim challenging the discharge ordinance. Commonwealth Court applied a two-part intermediate scrutiny test finding that maintaining proficiency was an ancillary right related to the core 2nd Amendment right of home defense. The court held that an outright ban on target practice outside of two zones violated the right because the township did not prove that the zoning regulation "does not burden more conduct than is reasonably necessary."

Public Employment

Riley v. Liberty Borough, 2021 WL 3441417 (Pa. Cmwlth., Aug. 6, 2021).** In this unpublished, interlocutory appeal, the Commonwealth Court addressed whether a contractual reference to Act 600 pension benefits could guarantee a retiring borough police chief benefits under that act, even though the Borough had never completed the statutory process to create an Act 600 pension. Even though the parties agreed to a facially valid contract, the Commonwealth Court found that the trial court could not uphold the Act 600 pension as a contractual guarantee where the provisions of Act 600 had not been followed. To do so would be enforcing a legal impossibility. Instead, the contractual promise should be stricken from the agreement through the contract's severability and illegality clause.

Public Office

In re Bolus, 251 A.3d 848 (Pa. Cmwlth., April 14, 2021). Bolus appealed from a March 22, 2021, trial court order striking candidate affidavits, setting aside nomination petitions, and striking his name from the ballot as a candidate for Scranton mayor at special election primary to be held on May 18, 2021. Commonwealth Court affirmed, holding that the candidate's convictions for felonies and *crimen falsi* render his affidavits materially false as to his constitutional eligibility to hold office and thus he is ineligible under the Election Code to *run* for office as well as constitutionally ineligible to *hold* office. The fact that some of the candidate's disqualifying convictions may be eligible for expungement is inconsequential to his disqualification.

Taxes and Finance

GM Berkshire Hills LLC v. Berks County Board of Assessment, 2021 WL 2835340 (Pa. Cmwlth., July 8, 2021). In 2018, School District passed a resolution authorizing its business office to initiate and litigate appeals of property assessments within the district. The resolution directed the business office to use the State Tax Equalization Board's (STEB) recent sales monthly reports as a basis to select properties for appeal. The resolution instructed the district business office to begin with

recently sold properties and their current assessments from the STEB reports, apply the County's applicable common level ratio of 68.5% to each recent sales price, compare the resulting figure to the property's current assessed value, and pursue an appeal if the difference between the two figures exceeded $150,000 for a given property. Commonwealth Court affirmed the trial court determination that the appeal selection methodology was constitutionally sound. Selection of properties to appeal based on recent sales did not violate either federal Equal Protection or the Uniformity Clause of the PA Constitution.

Phoebe Services, Inc. v. City of Allentown, 2021 WL 3555989 (Pa. Cmwlth., Aug. 12, 2021). Multi-service senior services organization (Organization), a nonprofit corporation that was already exempt from *federal* income tax as a charitable organization (under 26 U.S.C.A. § 501(c)(3)) and already held an exemption from *state* sales tax as a charitable entity, appealed decision of City tax appeal board which found that Organization did not qualify for exemption from business privilege tax as a purely public charity and affirmed city revenue and audit bureau's retroactive imposition of business privilege tax. Under the city's ordinance, the term "business" is defined as "any activity carried on or exercised for *gain or profit* in the city, including but not limited to ... the performance of services." (Citation omitted). In addition, the ordinance expressly exempts "nonprofit corporations or associations *operating as purely public charities*" from business privilege taxation. The trial court held that Organization was not liable to city for any business privilege tax. City and city tax appeal board appealed. Commonwealth Court affirmed, citing PA Supreme Court's holding in *School District of Philadelphia v. Frankford Grocery Co.*, 103 A.2d 738, 741 (1954), "[w]e are not concerned with the form but with the substance of [an organization's] structure and operation in its cooperative activities." The court noted that "the diversion of surplus monies into other entities that have a profit motive is evidence of a profit motive" and that "surplus revenue that is diverted to employees or directors, such as 'excessive' salaries and fringe benefits to corporate officers, may evidence a private profit motive." The court further noted that other factors indicative of profit motive include providing services to for-profit businesses, making loans at market interest rates, and owning for-profit subsidiary corporations. The court here observed that the record evidenced that the Organization performed a variety of charity services. However, evidence was also presented that its incentive pay plan "is typical of other healthcare nonprofits, represents fair market value for the services provided, and is not directly tied to the financial status of the nonprofit." The court declined to hold that an entity must financially harm itself to negate a profit motive.

Legislative Updates: *(Continued from page 1)*

SB 439, PN 457: Amends the Recorder of Deeds Fee Law to remove the sunset date created by Act 152 of 2016 relating to the County Demolition Funding Program. SB 439 passed the Senate on June 21, 2021. Referred to the House Urban Affairs Committee.

SB 675, PN 746: Amends the Third Class City Code in a manner consistent with a recent revision to the First Class Township Code as comprehensively updated by Act 96 of 2020 as follows: (1) authorize a third class city to appoint a partnership, limited partnership, association, or professional corporation as the city administrator/manager; and (2) specify that only a city administrator/manager who is an individual may also serve as the city chief fiscal officer. *See also* ***HB 1367.*** SB 675 passed the Senate on June 24, 2021. Referred to the House Local Government Committee.

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