LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 4, 2019

As we look back on 2019, it is easy to appreciate that the Pennsylvania Supreme Court had much to say about municipal law. This assemblage of summaries contains momentous cases from the court on the Police Tenure Act, preemption and adverse possession, as well as important federal court decisions on the First Amendment. Also included is our list of some municipal law bills-in-process, including a bill directly addressing the holding in one of those cases. The staff here at the Local Government Commission wishes everyone the best year ahead.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

HB 2214, PN 3128: Amends Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes to specify that any real property owned by a local government unit shall be immune from a claim of adverse possession. HB 2214 was referred to the House Local Government Committee on January 14, 2020.

HB 2073, PN 3052: Modernizes and recodifies the First Class Township Code by removing obsolete provisions, incorporating language to reflect case law and current practices, standards and requirements, updating archaic language or language in conflict with other statutes, consolidating common subjects, and adding some language, as relevant, that had been part of previous significant recodifications. HB 2073 passed the House unanimously.

Continued on page 6 >>

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Adverse Possession

City of Philadelphia v. Galdo, 217 A.3d 811 (Pa., Sept. 26, 2019). Property originally condemned for temporary transportation purposes by City in coordination with the Commonwealth in 1974 and subsequently retained as "surplus property" after the related project was completed, was cleared of weeds and trash, enclosed and developed by citizen. The City initiated steps to sell the property and eventually brought an action for ejectment. Citizen counterclaimed for quiet title, alleging adverse possession. The trial court did not examine the elements of adverse possession, holding that the City was acting as an agent for the Commonwealth when the property was condemned, and adverse possession could not run against the Commonwealth or its agents. The court also noted that the property was "devoted to a public use." Commonwealth Court vacated the trial court's order and remanded the matter for trial on the adverse possession claim, viewing the primary issue as "whether a claim of adverse possession can lie [when] the City's only use of the [Parcel] during the statutory period was to hold the [Parcel] for possible future sale." The court began its analysis by acknowledging that, unlike the Commonwealth, political subdivisions are not immune from adverse possession claims unless the property is devoted to a public use. Commonwealth Court further held that holding a property for subsequent sale was not a public use. The Pennsylvania Supreme Court affirmed and remanded for further proceedings on the adverse possession claim, holding that adverse possession may lie against political subdivisions, retaining property for subsequent sale is not a public use, that public use may lapse or be abandoned, and that a lapse occurred when the transportation project was completed.

Civil Rights

Pomicter v. Luzerne County Convention Center Authority, 939 F.3d 534 (3d Cir., Sept. 23, 2019). Authority's speech policies for protests at arena, including requirements that protesters stand within "designated area[s]" on the concourse and distribute handouts only from within those areas, a prohibition on using profanity and "promotional verbiage suggesting vulgarity or profanity," and a

ban on voice amplification ban were challenged under the First Amendment. The District Court ruled in favor of Plaintiffs and found all three restrictions violated the First Amendment. The Authority appealed. The Third Circuit held that the concourse was a non-public forum, and thus the Authority had greater latitude to establish regulations, provided the regulations are reasonably related to the purpose of the forum. The Third Circuit concluded that the policy of sequestering protesters to designated areas satisfies the reasonableness test because the purpose of the concourse is orderly movement of crowds, and thus the district court was reversed and remanded for an examination of the regulation under the Pennsylvania Constitution. The Third Circuit found that for the policies banning profanity and artificial voice amplification, the Authority did not meet the burden to show that these restrictions are reasonable in light of the purpose of the forum, and therefore the Third Circuit affirmed the lower court's injunction of those policies.

Freedom from Religion Foundation v. County of Lehigh, 933 F.3d 275 (3d Cir., Aug. 8, 2019). For almost 75 years, Lehigh County's official seal has included a Latin cross surrounded by a dozen secular symbols of historical, patriotic, cultural and economic significance to the community. In 2017, the district court found that the seal was unconstitutional under the *Lemon* test as modified by the endorsement test, i.e., whether a reasonable observer would perceive the seal as an endorsement of religion. On appeal, the Third Circuit reversed and held, consistent with the 2019 U.S. Supreme Court case, *American Legion v. American Humanist Association* (summarized in the LOCAL GOVERNMENT COMMISSION QUARTERLY LEGAL UPDATE, Issue 3, 2019, p. 2) that the *Lemon* test does not apply to religious references or to imagery in public monuments, symbols, mottos, displays, and ceremonies, such as the seal at issue. In the instant matter, the Third Circuit noted that although the Latin cross is the focal point of the seal, the cross does not stand alone, but is surrounded by secular symbols so that the seal as a whole does not suggest a sacred meaning. Further, the seal is a familiar, embedded feature of the county, attaining a broader meaning than any one of its symbols. Thus, the Third Circuit held that the seal does not violate the Establishment Clause of the First Amendment, reversing the judgment of the district court.

Moreover, under COLTS's [transit system advertising regulations], it must distinguish messages that are "about" religion from those that address a permitted topic from a religious perspective. Assuming that distinction is viable, we question whether it is reasonable to ask officials to draw it. True, reasonableness review imposes a light burden. . . . And we do not suggest there is any one way that COLTS had to pursue its interests. But COLTS bears the burden to show that extirpating religion from its forum was reasonable. For all the reasons we have stated, we hold it has not done so.

- *Ne. Pennsylvania Freethought Soc'y. v. Cty. of Lackawanna Transit Sys.*

Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, 938 F.3d 424 (3d Cir., Sept. 17, 2019). Society sought to purchase space on transit vehicles to advertise atheist message and contact information. Ads were rejected under both a 2011 and a revised 2013 policy which rejected ads "that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or [that] are otherwise religious in nature." In a challenge of the policy, the district court ruled in favor of the Transit System, deciding that the ad space was a limited public forum, and that a blanket prohibition on "the subject of religion" was a viewpoint-neutral permissible restriction, provided it was reasonable. The court held the restriction was reasonable because religious ads might provoke "a controversial discussion" which could "potentially lead to a dangerous situation for both passengers and drivers." Furthermore, the policy was not unconstitutionally vague because a person of ordinary intelligence could determine which types of ads were permissible and which were not. The Third Circuit reversed. Citing U.S. Supreme Court precedent, the Circuit Court held that banning speech "religious in nature" is viewpoint

discrimination, impermissible in any forum. Furthermore, even if the regulation were interpreted as being a "content" ban, the Transit System had not adequately demonstrated that a religious content distinction is reasonable.

Code Enforcement

Firearm Owners Against Crime v. City of Harrisburg, 218 A.3d 497 (Pa. Cmwlth., Sept. 12, 2019). Appellant firearms rights organization challenged five City ordinances. After dismissal for lack of standing in federal court, the action was remanded to the state trial court, whereupon the City defendants filed an array of preliminary objections, including dismissal for failure to state constitutional claims and a lack of standing under Pennsylvania rules. The trial court sustained the standing preliminary objection, finding that "[p]laintiffs have not pled any facts to show that they were harmed by any of the subject Ordinances . . . [and] do not allege that they have ever been cited or personally threatened with citation under any of the Ordinances. Rather, Plaintiffs assert potential harm that is entirely speculative, as it is based on events that may never occur." Commonwealth Court reversed in part and affirmed in part. Both the organization and individual plaintiffs enjoyed traditional standing to challenge four of the five of the ordinances because they either lived, worked or frequented the City, were licensed to carry firearms, and risked prosecution. Because a state of emergency ordinance was only enforceable during an emergency, the court affirmed the preliminary objection as to that ordinance, and the challenge to the assertion of an immunity defense.

Employment

Exeter Township v. Penna. Labor Relations Bd., 211 A.3d 752 (Pa., July 17, 2019). Board appealed decision of the Commonwealth Court (summarized in the LOCAL GOVERNMENT COMMISSION QUARTERLY LEGAL UPDATE, Spring, 2018, p. 2) finding that the statutory powers and duties of a zoning officer established under the Municipalities Planning Code (MPC) was sufficient to determine that the Township's zoning officer was a management employee exempt from the bargaining unit under the Public Employee Relations Act (PERA) without examining evidence of the individual employee's job responsibilities. Supreme Court rejected that MPC provision charging zoning officer to "administer the zoning ordinance in accordance with its literal terms" was adequate to satisfy the statutory test in PERA determining that an individual is a management employee who is directly involved in the determination or implementation of policy. By finding that administration of, or essentially "adhering to" the literal terms of an ordinance is not the same as having the responsibility to direct the implementation of policy, the court reversed.

Eminent Domain

Griffith v. Millcreek Township, 215 A.3d 72 (Pa.Cmwlth., July 30, 2019). The court of common pleas granted landowners' petition for appointment of a board of viewers. The petition alleged a *de facto* taking of landowners' property when a storm water landslide forced them to abandon their home. On appeal, the Commonwealth Court held that the township's design, construction, review, acceptance, operation and/or maintenance of a subdivision's storm water system that allegedly caused the landslide did not constitute a *de facto* taking of property pursuant to the Eminent Domain Code. The court noted that while the township may have been negligent in the planning and operation of the storm water system, this question was not before the court and was not decided.

Land Use

Berner v. Montour Township Zoning Hearing Board, 217 A.3d 238 (Pa., Sept. 26, 2019). Township zoning ordinance contained special exception approval for hog raising, including a requirement to "submit facility designs and legally binding assurances with performance guarantees which demonstrate that all facilities necessary for manure and wastewater management, materials storage, water supply and processing or shipping operations will be conducted without adverse impact upon adjacent properties." No such requirements were contained in the Nutrient Management Act, 3 Pa. C.S. §§501-522 or related regulations. The zoning hearing board held that the ordinance requirements were preempted, and the trial court affirmed on appeal. On further appeal, Commonwealth Court reversed, holding that the application in question was for an operation that did not require a nutrient management plan, and thus "because non-NMP operations like Applicant's proposed use are free from the requirements imposed pursuant to the Act, they do not get the benefit of the Act's preemption protection." The Pennsylvania Supreme Court reversed, holding that "the Act preempts any local

regulation of nutrient management to the extent the local regulation imposes requirements that are stricter than, inconsistent with, or in conflict with the state law requirements, irrespective of whether a particular agricultural operation has an NMP mandating compliance with the Act."

In re Board of Commissioners of Cheltenham Twp., 211 A.3d 845 (Pa., July 17, 2019). Commissioners contend that the Commonwealth Court erred by finding that developer's 2008 sketch plan, which initiated the subdivision and land development process for a large multi-use development, vested developer with the right to pursue a related special exception zoning application under the then in effect zoning ordinance. Because subsequent 2012 zoning ordinance would not have allowed developer to qualify for a special exception at the time that the developer filed the 2015 zoning application, Commissioners sought appeal to determine whether the Commonwealth Court had correctly applied section 917 of the Municipalities Planning Code (MPC). Supreme Court found that sections 508(4)(i) and 917 of the MPC complement one another by affording the same kind of protection to an applicant making a filing under the subdivision and land development ordinance (SALDO) or zoning ordinance that a change in either could not be applied to a pending application. Because the developers still valid 2008 sketch plan had been filed under the SALDO and relied upon a special exception to the zoning ordinance then in effect, the vested right to not be subject to a change in the zoning ordinance applied as part of the entire application, despite the later filed zoning application.

We find in the DPCL a holistic scheme that… favors local regulation as informed by the expertise of a dedicated local board or department of health over state-level regulation, and correspondingly allows local lawmakers to impose more stringent regulations than state law provides. Thus, in priority order, a municipality with a board or department of health may enact ordinances or promulgate rules and regulations in service of disease prevention and control. Where a municipality lacks its own board or department of health, but lies within the jurisdiction of a county department of health, the municipality may enact such ordinances, while the county board or department of health may issue rules and regulations. Absent a municipal or county board or department of health, a municipality falls within the jurisdiction of the state board.

- *Pennsylvania Restaurant and Lodging Association et al. v. City of Pittsburgh*

Home Rule

Pennsylvania Restaurant and Lodging Association et al. v. City of Pittsburgh, 211 A.3d 810 (Pa., July 17, 2019). Appellee objectors, representing a multitude of businesses and business organizations, sought declaratory judgment to invalidate two ordinances on the basis that the appellant city's enactments exceeded the city's authority under its home rule charter and other laws. Supreme Court sustained the decision of the Commonwealth Court to invalidate ordinance that mandated building owners to train occupants and employees on disaster preparedness and counterterrorism on the basis that the Home Rule Act contained an exception to home rule powers related to the regulation of business, and that the City could not rely upon the general powers relating to health and safety under the Second Class County Code or general power to maintain a disaster management plan under the Emergency Code. However, this Court found that the regulation of business exception would not invalidate the City's ordinance mandating that employers provide paid sick leave where the Disease Prevention and Control Law (DPCL) permits a municipality served by a board of health to enact ordinances relating to disease prevention.

Municipal Claims

McCormick v. Dunkard Valley Joint Municipal Authority, 218 A.3d 528 (Pa. Cmwlth., Sept. 24, 2019). Appellant disputed water shut-off notice for delinquent water bills. A hearing was conducted and the hearing officer recommended that the authority proceed with the collection of

the debt and that the shut-off order was valid. Counsel for the authority notified Appellant by mail of the decision, who then took an appeal to the court of common pleas. The trial court required that Appellant serve the appeal pursuant to the PA Rules of Civil Procedure. Appellant served notice by mail of a copy of the appeal to the address of counsel for the authority, and later obtained a default judgment based on Authority's failure to file a timely responsive pleading to his appeal. Counsel for the Authority subsequently entered his appearance on behalf of the Authority, filing a petition to strike the default judgment and to quash the appeal, and seeking attorney fees. The Authority asserted that the appeal was governed by the Local Agency Law, 2 Pa. C.S. §§ 551-555, 751-754, and that a statutory appeal must be served on the local agency by certified mail, return receipt requested, which did not occur. The trial court granted Authority's petition to strike the default judgment and motion to quash Appellant's appeal of the Authority's decision. The trial court denied the petition for attorney fees. Commonwealth Court affirmed in part, vacated and remanded. The operative law, the Water Services Act, Act 28 of 2006, is silent on appellant rights and procedures, and thus, the Local Agency Law applies. Trial courts are free to adopt the Rules of Civil Procedure for local agency appeals, but that did not occur in this case. Consequently, no default judgment was appropriate and the Authority was not required to file a responsive pleading. However, quashing of the appeal was not appropriate either given that certified mailing of the notice was not required. The case was remanded to determine if counsel for the Authority received notice of the appeal.

Municipal Fees

Ziegler v. City of Reading, 216 A.3d 1192 (Pa.Cmwlth., Aug. 15, 2019). On remand to determine the efficiency of the city's recycling program, the court of common pleas found the city's residential curbside recycling fees covered all costs of recycling and generated surpluses and were thus inconsistent with Act 101. Thus, the trial court entered a declaratory judgment on behalf of residents. The city appealed to the Commonwealth Court which determined that since "leaf waste" falls within the definition of recycling under Act 101, costs related to leaf waste are part of the recycling program, despite the city accounting for this expense in its general fund. The city's operational costs of its recycling program are not complete without including these costs. Similarly, evidence showed that the city ran a deficit in its recycling program for several years which needs to be recouped in future years. The trial court erred, therefore, by not considering these deficits in its calculations. Additionally, the city anticipated an upcoming cost of over $1 million to replace recycling bins for all of its customer households. The trial court did not consider this amount in its analysis or offer any explanation as to why anticipated costs could not be used to offset the amount of revenue generated. In summary, since the trial court's calculations disregarded key data regarding actual costs of the program, the trial court did not create an accurate and complete picture of the program's efficiency. Thus, the Commonwealth Court found it is unable to determine whether the recycling fee is consistent with or contrary to Act 101 so it again vacated and remanded for further calculations on issues relating to the city's recycling fee and program costs.

Police Tenure Act

DeForte v. Borough of Worthington, 212 A.3d 1018 (Pa., July 17, 2019). In the course of a related case, the Third Circuit certified a question to the Pennsylvania Supreme Court as to whether the Borough Code and Police Tenure Act are to be read together such that every police force in a borough would operate under one or the other, and whether the same test under both statutes could determine if an officer is a member of a force. In examining this question, the court compared the provisions of the Borough Code, which would apply to a police

> *In sum…(1) the civil service protections embodied in the Borough Code and the Tenure Act are broadly* **in pari materia** *insofar as they are intended to govern all borough police forces; and (2) when calculating the size of a borough police force in any given case, the same test should be used.*
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> - *DeForte v. Borough of Worthington*

force of three or more full-time members, and the Police Tenure Act, which would apply to a police force of less than three members. The court, however, found that the Police Tenure Act did not specifically define membership, and under the Borough Code only "extra" police employed periodically were excluded as members of a force in a borough. Thus, the Supreme Court certified that officers devoting their "normal working hours," regardless of whether the officer was part- or full-time, met the criteria for membership in a force under the Borough Code, and the same test should apply to the Police Tenure Act.

Preemption

PPL Electric Utilities Corporation v. City of Lancaster, 214 A.3d 639 (Pa., Aug. 20, 2019). At issue was whether a city's ordinance was authorized to do any of the following: (1) inspect utility facilities in municipal rights-of-way for purposes of municipal code compliance; (2) direct utilities to relocate or remove utility facilities; (3) impose penalties for a utility's violation of any provision of the ordinance regarding management of a municipality's rights-of-way provided the provision was within the PUC's exclusive jurisdiction; and finally, (4) impose maintenance fees on utilities for the occupancy and use of the city's rights-of-way. The Pennsylvania Supreme Court held that all of the foregoing were preempted by the Public Utility Code on the basis of field preemption. Previously, the Commonwealth Court had upheld the city's annual occupancy fee on utilities that used the city's rights-of-way, but the Supreme Court reversed in favor of the PUC's authority to regulate public utilities.

Roads

In re Adams, 212 A.3d 1004 (Pa., July 17, 2019). Landowner petitioned to open a private road on adjoining land for the purpose of building a mountaintop cabin for seasonal use. Board of view and Commonwealth Court supported the landowner's petition on the basis that property is otherwise effectively landlocked and existing logging trail is inadequate to access the property for construction as well as cost prohibitive to improve. In allowing the appeal, the Supreme Court noted that the current access is, in fact, adequate to support the current uses of the property – primarily hunting. At issue here, the court considered as a case of first impression, "whether a landowner who has adequate access … for current use … can demonstrate a private road is necessary for a different proposed future use." The court concluded that avoiding the cost of improving an existing method of access to improve property in support of a proposed future use constitutes an inadequate necessity to justify a taking to open a private road.

Taxation

S&H Transport Inc. v. City of York, 210 A.3d 1028 (Pa., July 17, 2019). Appellant freight broker collected fees to arrange shipping services and received a commission from the fees it received, less the money forwarded to the final shipping entity for the rendered service. In its application of the Business Privilege and Mercantile Tax (BPT) levied under the Local Tax Enabling Act (LTEA), the City of York sought to levy the tax on all of the money received by Appellant as part of its levy on the gross receipts of the business activity. Amidst a complex history of appeals, the Supreme Court reviewed Appellant's claim that the City was improper to include in its calculation of the gross receipts the amount of the shipping fees that were forwarded to the final shipping entity. The court rejected Appellant's argument that a shipping broker is exempt from paying a BPT on fees received for shipping under and exclusion in the LTEA which applies to shipping costs for the purchaser advanced pursuant to a contract for sale, because the broker is neither the buyer nor seller in the transaction. However, the court, nevertheless exempted the shipping fees according to the City's own interpretive regulation.

Legislative Updates:

Continued from page 1

SBs 690, 691, 692 (PN 829, 830, 831, respectively): This bill package amends Act 34 of 1953 (relating to contracts of incorporated towns), the Second Class Township Code, Titles 8 (Boroughs and Incorporated Towns) and 11 (Cities), respectively, to increase from $1,500 to $6,000 the value of municipal real property below which a municipality need not publicly advertise for bids when selling its real property. All passed the Senate and the House unanimously.