LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 4, 2020

Greetings from the Director:

As we enter the holiday season for many people, we here at the Local Government Commission wish everyone a safe and joyful November and December, and a bright new year. That said, in addition to our ongoing duties of advising the General Assembly on matters involving local government, we continue our review of those appellate cases that policymakers, municipal officials and employees will be reconciling going forward. This collection includes an important case clarifying quorum requirements for authorities, the constitutional consequences of property tax collection procedures, and a Third Circuit articulation of the proper First Amendment analysis for speech at mortgage foreclosures. As usual, we include descriptions of a handful of bills, including recent Commission-sponsored legislation, intended to assist our municipalities this session. Thank you for your continued readership!

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

HB 2073, PN 3052: This bill, sponsored by the Local Government Commission and introduced in November 2019, was the first major revision of the First Class Township Code in over 70 years. It 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 both chambers unanimously and was signed by the Governor as Act 96 of 2020 on October 29, 2020.

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Civil Rights

Black & Davidson v. Chambersburg Area School Dist., 2020 WL 3963773 (M.D. Pa., July 13, 2020). Plaintiff law firm was replaced as solicitor to defendant school board following the plaintiff's support for a slate of school board candidates that was unsuccessful in a contested election. Former solicitors contended that the new board's actions constituted a Section 1983 claim on the basis that the termination violated the plaintiff's rights to free speech and association. District court found that a school district solicitor's role in "drafting, editing, and advising the Board on confidentiality policies, communications policies, [etc]" is adequate to permit termination solely on an employee's political beliefs under the *Elrod / Branti* test. Further, the plaintiffs are unable to satisfy a *Pickering* analysis that there is an adequate matter of public concern outweighing the school district's countervailing interests to be served by a solicitor that shares its policy views. Thus, the court rejected the plaintiff's claim on both First Amendment grounds.

Porter v. City of Philadelphia, 975 F.3d 374 (3d Cir., Sept. 18, 2020). At issue was whether the City of Philadelphia's unwritten policy of preventing announcements at mortgage foreclosure sheriff's sales was unconstitutional. Pursuant to that policy, City employees forcibly prevented the property owner from publicly announcing to bidders at the sale that he and his wife had an unrecorded interest in a property being auctioned. Property owner asserted that the attorney for the Sheriff's Office inconsistently enforced the policy based on

CONGRATULATIONS!

Please join us in wishing Commission Legal Counsel, Wanda Snader Dehan, a well-deserved and happy retirement. Among her most recent accomplishments, she was instrumental in developing Act 96 of 2020, the first major revision of the First Class Township Code since 1949.

what the speaker wanted to say, and therefore filed suit against the City, arguing that the City's policy violated his First Amendment right to free speech. A jury agreed and awarded him $750,000 in damages and the District Court thereafter upheld that award.

On appeal, the Third Circuit reversed and remanded with instructions to vacate the judgment and enter judgment in favor of the city. The court held that the city's policy barring public announcements at sheriff's sales was an "official policy," for purposes of § 1983 municipal liability, but that the attorney for the sheriff's office was not a policymaker for the city for purpose of § 1983 municipal liability. Moreover, the city's policy of prohibiting all public announcements at mortgage foreclosure sheriff's auction did not facially violate First Amendment right of free speech. Mortgage foreclosure sheriff's sale was a "nonpublic forum," so that city's policy prohibiting public announcements or comments during the auction was valid restriction on speech, under the First Amendment, so long as it was viewpoint neutral and reasonable in light of the city's right to preserve the property under its control for the purpose or use of conducting a public auction of foreclosed properties. Thus, despite the actions of the individual city employee, the Third Circuit found no liability for the city.

Government Accountability

Kabel v. Manheim Township School District, 2020 WL 3637945 (Pa. Cmwlth., July 6, 2020).** School District appealed order from trial court granting Tax Collector's request for declaratory and injunctive relief to collect real estate taxes on School District's behalf and receive reasonable compensation for such collection, on the basis that the trial court erred as a matter of law and abused its discretion in determining Tax Collector has standing and a valid cause of action. Commonwealth Court affirmed the order. Tax Collector filed a complaint in 2017, one day prior to her election, seeking a declaration as to her right to collect taxes on behalf of School District and a reasonable compensation. School District then passed a Resolution in 2018 setting requirements for tax collection. Tax Collector filed second complaint challenging the resolution. Trial court consolidated the two complaints and ultimately denied School District's motion for summary judgment due to Tax Collector's lack of standing or viable cause of action. School District appealed. Because Tax Collector had an immediate interest in this litigation and filed her initial complaint prior to the election, the trial court properly held Tax Collector had standing. Further, Tax Collector stated a viable cause of action, and the trial court did not impermissibly order School District to increase Tax Collector's compensation, but rather was consistent with the Local Tax Collection Law.

Podejko v. Department of Transportation, 236 A. 3d 1216 (Pa. Cmwlth., July 27, 2020). Appellants sued Department, township and volunteer fire company for damages related to diversion, via stationary pumper truck, of flood water from road surface to private property, destroying a playground and two rooms of Appellants' preschool facility. The trial court granted defendant fire company's motion to dismiss, reasoning "that pumping water from a fire truck does not require any decisions related to transporting an individual from one place to another," and, consequently, the pumper truck was not "in operation" for purposes of the vehicle liability exception to the Political Subdivision Tort Claims Act, 42 Pa. C.S. §§8541 et seq. Commonwealth Court reversed. Holding that "courts cannot ignore 'the purpose for which the vehicle is operated[,]'" it noted that the purpose of the truck was not only to transport firefighters but to remove flood waters. By doing so, the department "operated" the vehicle, and the Vehicle Liability Exception to governmental immunity applies herein if appellants can prove that the fire department was negligent and that negligence was the proximate cause of the damages to their property.

Eminent Domain

In Re Condemnation of Land in Bristol Township, 2020 WL 5083485 (Pa. Cmwlth., August 28, 2020). Redevelopment authority condemned mortgagor's property and distributed just compensation. Mortgagee petitioned the court to appoint a board of view, arguing, in part, that mortgage instrument assigned condemnee's rights, including the right to petition for a view, which is authorized by the Eminent Domain Code only for a condemnor, condemnee, or displaced person. The trial court denied petition for lack of standing and subsequently denied mortgagee's motion for reconsideration. Mortgagee appealed and Commonwealth Court agreed with

the trial court. After examining the mortgage instrument and the law related to assignments, the Court concluded that the instrument did not sufficiently transfer rights for the mortgagee to assume rights of the condemnor under the Code. The Court acknowledged that mortgagee may not have recourse to adequately protect its interest, but noted that the mortgage could have been written to include a sufficient assignment and mortgagee had an opportunity under the Code to intervene in the proceedings but failed to do so until it petitioned for a view.

Land Use

Joos v. Board of Supervisors of Charlestown Township, 237 A.3d 624 (Pa. Cmwlth., July 31, 2020). Landowners submitted plan to revise lot lines. The township approved the plan subject to conditions that owners maintain an existing shared driveway and refrain from constructing a new driveway. Owners rejected the condition, and township agreed to reconsider, but ultimately notified owners to resubmit their application or appeal the approval. Owners appealed, arguing, in part, that the township did not comply with requirements within the Municipalities Planning Code (53 P.S. 10508(2),(3), 10503(9)) that requires written notice and a citation to specific statutory or ordinance provisions and that deemed approval and voiding of the conditions would result from the failure to comply with the requirements. Furthermore, owners argued that the township was unable to impose conditions on a plan absent consent from an applicant. The trial court rejected the arguments and held that the subdivision and land development ordinance (SALDO) of the township permitted the driveway conditions. The court also rejected a petition for contempt brought against the township. The Commonwealth Court affirmed the order denying a finding of contempt, noting that there was no wrongful intent. It reversed the order upholding the township's conditional grant of the plan. Although the Court agreed that the procedural requirements at issue only applied to the denial of a plan, it found no authorization in the SALDO to impose driveway-related conditions to a lot line revision application.

Carunchio v. Swarthmore Borough Council, 2020 WL 4592161 (Pa. Cmwlth., August 11, 2020). A nonprofit organization providing temporary housing for cancer patients at nearby specialty hospitals sought an accommodation to the Borough's zoning ordinance limiting the subject parcel to single family dwellings on the basis that the Fair Housing Amendment Act (FHAA) requires accommodation in rules or policies related to housing to afford persons with disabilities opportunities to equal housing. Appellant landowners appealed Borough's decision to provide the accommodation to the organization on the basis that the organization failed to establish that the accommodation is necessary because the requested accommodation provided an unequal opportunity since 14 unrelated persons would not be able to live in the property under the ordinance. In addition to upholding the Borough's determination on additional bases, the Commonwealth Court found that the FHAA framework and existing precedent shifted the burden onto the appellants to demonstrate that the Borough's accommodation is unreasonable once the Borough had determined that an accommodation was necessary.

Bank...could have sought to intervene in the matter to protect its interest in the Property, but did not. This failure...may have indeed left Bank without recourse in this matter. However, it is not for this Court to provide an avenue of protection or relief where the legislature has not, and where Bank did not take appropriate steps to adequately protect its own interest should the Property be taken by condemnation.

- In Re Condemnation of Land in Bristol Twp.

Municipal Governance

Baribault v. Zoning Hearing Bd. Of Haverford Twp., 236 A.3d 112 (Pa. Cmwlth., July 13, 2020). Appellee landowners seek the enforcement of an apparent settlement agreement between them, the Township, and the Township's Zoning Hearing

Board. Following an executive session of the Township Commissioners, the Township solicitor communicated the Township's acceptance of the settlement to the other parties, although the Commissioners never took a final vote on the agreement at a public meeting, and the agreement was never signed by the solicitor or another representative of the Township. Commonwealth Court upheld the trial court findings that the solicitor's communications on behalf of the Township were adequate evidence of the existence of the agreement, and the solicitor's apparent authority to bind the Township notwithstanding the procedural defects created by the Commissioner's failure to ratify the agreement at an open meeting. Defects as to the adherence to the Sunshine Act are within the Court's discretion to enforce, and where, as here, the parties had clearly made an agreement, nullification of the agreement would be unjust as to the landowners who had reasonably relied on the Township's representations.

United Blower, Inc. v. Lycoming County Water and Sewer Authority, 2020 WL 3957316 (Pa. Cmwlth., July 13, 2020).** Authority held an administrative hearing under the Local Agency Law to issue an adjudication finding that the blowers and assemblies that the Authority purchased from the Appellant and its subcontractors did not constitute defined United States Steel Products under the provisions of the Steel Act. Contractor's appeal to trial court yielded a result that determined that the contracts provided by the contractor did not violate the Steel Act because the contractor provided the blower component of the contract without charge and only billed the Authority for the assemblies (while accepting blowers currently in use as an in-kind exchange). Calculated alone, the assemblies and the associated costs did meet the definition of United States Steel Products. In its appeal to the Commonwealth Court, the Authority then contended that the trial court's decision to hear the appealed adjudication *de novo* improperly exceeded the standard of review under the Local Agency Law by setting aside the fact findings determined by the Authority's independent hearing officer. However the Commonwealth Court determined that the trial court did not improperly exceed its standard of review because it determined its own fact findings only because of the hearing officer's errors of law in arriving at the factual determinations, and as a result the Commonwealth Court upheld the trial court's determination that there had been no violation of the Steel Act.

SEDA-COG Joint Rail Authority v. Carload Express, Inc., 2020 WL 5823494 (Pa., October 1, 2020). In this case of first impression, the Pennsylvania Supreme Court, affirmed the order of the Commonwealth Court and held that the Municipality Authorities Act (MAA) does not abrogate the common law rule that a simple majority of a municipal authority carries a vote. The Authority represented eight counties with each county appointing two members to the sixteen-member board. At the meeting in question, all sixteen members were present, but six members abstained from voting. Of the ten voting members, seven members voted for the awarding of the contract and three voted against.

Section 5610(e) of the MAA provides that "all action may be taken by vote of a *majority of the members present* unless the bylaws shall require a larger number." (Emphasis added.) The common law rule provides that, once a quorum is achieved, a simple *majority of the votes cast* may act on behalf of the body, including representative municipal bodies of limited membership of the type at issue here in the absence of any language to the contrary in the relevant enabling statute. At common law, actual voting was required to participate in a majority vote count because otherwise a member could attend the meeting and abstain from voting and have a different effect than if that person were absent from the meeting.

The trial court decided that the proper method for identifying the number of votes needed for the Authority to act was to determine the number of members "present" and then determine what a majority of that number would be. Thus, the trial court held that a nine-vote majority was required for the Authority to act because all sixteen members of the Authority were present at the board meeting in question.

On appeal, a unanimous panel of the Commonwealth Court reversed, holding that section 5610(e) incorporated the common law rule into the MAA and that as a result the seven-to-three vote constituted a majority sufficient to approve board action. A majority of the sixteen members (nine) constituted a quorum, but because only ten members of the board voted, the required number of votes for a majority was six. Since seven board members voted in favor of awarding a contract, the action carried.

The Commonwealth Court considered several sections within the Statutory Construction Act, that taken together,

dictate that where a post-1937 statute is a substantial reenactment of a pre-1937 statute, the earlier statute is viewed as continuing in operation and the rule of strict construction applicable to pre-1937 statutes continues to apply. The language regarding voting standards in section 5610(e) has existed since 1935.

The Pennsylvania Supreme Court held that the Commonwealth Court was correct in its interpretation of section 5610(e) and in its application of the presumption that reenactments of pre-1937 statutes are to be strictly construed in accordance with common law rules. Pursuant to section 1962 of the Statutory Construction Act, there is a presumption that section 5610(e) is a codification of the common law voting rules and the Court found no basis to conclude that the language of the statute clearly and definitely abrogated the common law voting standard.

After consideration, we conclude that the asserted right is not a fundamental constitutional right but, instead, a statutory remedy, provided as part of a legislative tax collection process. In so doing, we emphasize that the legislative branch has broad discretion in regard to tax collection... This Court has additionally opined that the right of redemption within a tax collection statute is not a vested right but rather merely a "right subject to the control of the Legislature."

- Lohr v. Saratoga

Municipal Services

Crown Castle NG East, LLC v. PA Public Utility Commission, 234 A.3d 665 (Pa., Jul. 21, 2020). Prior to 2015, the Pennsylvania Public Utility Commission (PUC) issued Certificates of Public Convenience to operators and providers of distributed antennae systems (DAS) (mini-cell towers) which relay and amplify cellular and data signals. A Certificate of Public Convenience provides DAS operators and providers with the power of eminent domain, exemption from local zoning ordinances, and access to public utility poles and public rights of way. In 2015, however, after a review of whether DAS providers and operators meet the definition of a "public utility," the PUC determined that DAS providers and operators do not meet the definition and are therefore not entitled to Certificates of Public Convenience. The Commonwealth Court reversed and found that DAS operators and providers were not exempt from PUC regulation and could continue to seek Certificates of Public Convenience.

On appeal, the Pennsylvania Supreme Court upheld the Commonwealth Court's decision finding that DAS networks are public utilities. Further, because the statute was not ambiguous, no deference was required to be given to the PUC's interpretation.

Neighborhood Revitalization

Philadelphia Community Development Coalition v. Isabella & 325 S. 18th Street, LLC, 2020 WL 5080001 (Pa. Cmwlth., August 28, 2020).** Appellant property owners appeal order from trial court approving the blight remediation plan (plan)of Property submitted by Coalition and order denying motion to terminate Coalition's conservatorship of Property. Commonwealth Court affirmed both orders. Appellants asserted that the plan was (1) not timely filed as required by the Abandoned and Blighted Property Conservatorship Act because the "final plan" was filed 29 days before the hearing, not 30 as the Act requires, and (2) structurally deficient because there was not a "financing plan". Appellants further argue that certain witnesses were not present at the hearing as required by the Act. The Court upheld the approval order from the trial court, finding that: (1) the plan was timely filed (only one document was filed one day late); (2) a financing plan was submitted (plan was to be self-financed); and (3) the Appellants were able to call witnesses and did not. Further, the Court affirmed the order denying the motion to terminate Coalition's conservatorship, holding that the Coalition has shown sufficient evidence of progress in implementing the plan.

Public Employment

Estate of Benyo v. Breidenbach, 233 A.3d 774 (Pa., July 21, 2020). In a matter of first impression, the Pennsylvania Supreme Court held that statutes providing for retirement allowances from police pension funds shall be payable only to the designated beneficiary and not subject to assignment or transfer, and that pension benefits shall not be subject to attachment, execution, levy, garnishment, or other legal process, applied only to pension funds in the possession of the plan administrator. This restriction did not prohibit enforcement of a property settlement agreement that directed wife to transfer those funds to husband's brother after wife received them. When wife agreed to waive all rights, title, and interest in husband's police pension she made a legally enforceable bargain, exposing herself to legal process if she refused to make good on her contractual obligations.

Taxation and Finance

Delaware County Tax Claim Bureau v. Bility, 2020 WL 4211566 (Pa. Cmwlth., July 23, 2020).** On the day before a September upset sale, property owner paid a portion of his delinquent taxes and entered into a special payment agreement to pay the remaining taxes by mid-December. The tax claim bureau sent a courtesy notice to the property owner in late November reminding the owner of the impending December sale, but property owner failed to make any additional payments. After the property sold at the December sale, property owner filed a petition to set aside the sale asserting that the tax claim bureau had not provided him with the required statutory notices.

The trial court found that the tax claim bureau complied with the relevant notice requirements under the Real Estate Tax Sale Law (RETSL) with supporting evidence in the record. Commonwealth Court affirmed the determination of the trial court by finding that even if the tax delinquent property owner had not received notice of the continued sale date for the property, the tax claim bureau was not required by statute to provide additional notice. Specifically, section 601(a) of RETSL provides that "[n]o additional notice of sale is required when the sale is adjourned, readjourned or continued if the sale is held by the end of the calendar year."

Lohr v. Saratoga Partners, L.P., 2020 WL 5823332 (Pa., October 1, 2020). Property owners appealed decision of Commonwealth Court affirming the trial court's denial of petition to redeem property. The Pennsylvania Supreme Court affirmed. Property owners were delinquent on property taxes owed on their Huntington County properties. The tax claim bureau filed for an upset sale, as authorized by the Real Estate Tax Sale Law (RETSL). After the sale, Property Owners filed a petition to redeem property sold at tax sale (petition), under the Municipal Claims and Tax Liens Act (MCTLA). Property Owners acknowledged in petition that MCTLA applies only in counties of the first and second class, whereas their property is located within a county of the sixth class. Property Owners argued that "the absence of a right of redemption provision in the RETSL, in contrast to the existence of the right in the MCTLA, results in citizens of second class A through eighth class counties being treated less favorably than citizens of first and second counties, in violation of the equal protection provisions of the United States and Pennsylvania Constitutions". The Commonwealth Court held that the equal protection challenge was subject to rational basis review, and as such, found that the distinction does pass rational basis test. The Court affirmed.

Legislative Updates:

(Continued from page 1)

HB 1032, PN 1204 & **HB 1033, PN 4539** are both outcomes of the Local Government Commission Assessment Reform Task Force and were signed into law by the Governor as Acts 87 and 88, respectively. HB 1032 provides for the appointment of two Certified Pennsylvania Evaluators (CPEs) to serve on the State Board of Certified Real Estate Appraisers (Board). The Board is responsible for oversight of CPEs, yet prior to this bill, no CPEs were appointed to the Board. HB 1033 amends the Assessors Certification Act by clarifying and strengthening the training and certification requirements for assessors and certain personnel working for revaluation (mass appraisal) companies. Both of these Acts will serve to improve property assessment throughout the Commonwealth.

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