



LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Fall 2016

Fall greetings from the Local Government Commission. This edition of our Legal Update contains some eventful decisions handed down in the last quarter, including an important discussion of the government's burden when attempting to regulate commercial speech, a Third Circuit examination of municipal taxpayer standing, and the highly-publicized Pennsylvania Supreme Court decision on the Act 13 oil and gas legislation, which shed some additional light on what constitutes prohibited special legislation. Until our next update in early 2017, we wish everyone a joyous and safe Holiday Season!

- Philip Klotz, Executive Director of the Local Government Commission

Legislative Updates:

SB 898 and SB 899 amend Second Class County Code and Consolidated County Assessment Law, respectively, to apply the existing reassessment antiwindfall provisions upon each county real estate tax, including special levies set by referendum, individually. Both bills passed Senate and given second consideration in House. See also HB 1330 and HB 1331.

HR 1053, PN 3983 is a Concurrent Resolution establishing a task force to implement recommendations related to the efficiency, transparency, modernization and fairness of the property assessment process in this Commonwealth. House Resolution 1053 passed the House. See also SR 447.

Continued on page 4 >>

Keep up with the latest from the Local Government Commission:

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Civil Rights

Nichols v. City of Rehoboth Beach, 2016 WL 4651383 (3rd Cir., September 7, 2016). Taxpayer brought civil rights claim challenging voting procedures (a six-month residency requirement and ability of property owners to vote more than once) of municipal referendum approving bond issue. Because plaintiff did not show direct link between expenditure of taxpayer funds and allegedly unconstitutional elements of special election, municipal taxpayer standing could not be established.

Mancini v. Northampton County, 2016 WL 4709108 (3rd Cir., September 9, 2016). In section 1983 action asserting that assistant solicitor was dismissed without due process, county's home rule charter and employment policies entitled career service employee to pretermination hearing before county personnel board, notwithstanding purported department reorganization, where charter established right of career service employee to remain employed, except on finding of "just cause," with no exception or special provision for reorganizations. Notwithstanding fact that employee

prevailed on only one of 15 claims and received only 5% of requested damages, plaintiff succeeded on "crucial issue which informed inquiries into [all claims]" such that District Court's award of attorney fees was not an abuse of discretion.

National Association for Advancement of Colored People v. City of Philadelphia, 2016 WL 4435626 (3rd Cir., August 23, 2016). City has written policy preventing private advertisers from displaying, in addition to other prohibited content, noncommercial content at Philadelphia International Airport. Appellant offered to pay market rate for ad containing noncommercial content. Although District Court determined that airport advertising space was limited/nonpublic forum, Third Circuit held that designation is of no consequence because banning of commercial content, on this record, is unreasonable and thus unconstitutional regardless of forum. Government bears burden of establishing "reasonableness" of the speech restriction by two-step process of first using record evidence and "commonsense inferences" sufficient to permit court to grasp purpose of forum, and provide a way of

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tying the limitation on speech to forum's purpose. In this matter, City had not sufficiently demonstrated restriction was reasonable.

No matter the type of forum, restrictions on speech on government property must be reasonable. The City's ban on non-commercial ads at the Airport is unreasonable because it is not supported by the record or by commonsense inferences. The burden to establish reasonableness is a light one, but the City has failed to meet it here.

- *NAACP v. City of Philadelphia*

Feibush v. Johnson, 2016 WL 4478775 (E.D. Pa. August 25, 2016). Developer brought First Amendment retaliation claim against city councilman. Upon jury verdict in favor of developer, councilman moved for judgment as a matter of law. City had policy of deferring to council member representing location of city property for introduction of resolution finalizing sale of property as required by City Home Rule Charter. After developer's bid for the property was accepted, councilman refused to introduce resolution. The District Court denied the motion, holding that evidence was sufficient to establish that developer's public comments disparaging councilman resulted in failure to complete sale, and that municipal custom of councilmanic prerogative was moving force behind deprivation of constitutional rights.

DeLuca v. Hazleton Police Dept., 144 A.3d 266 (Pa. Cmwlth., July 28, 2016). Appellant towing company appealed order of trial court dismissing local agency appeal. DeLuca appealed

from letter of City police department and chief suspending company from being placed on Department's emergency service towing rotation list for a period of three years. Trial court held that company had no constitutionally protected rights or interests in towing rotation warranting a right to appeal Department's suspension letter. Commonwealth Court reversed and remanded. Removal from rotation for "dishonesty and corruption" constituted final order potentially affecting "stigma-plus" liberty interest, thus implicating procedural due process and the Local Agency Law.

Barnard v. Lackawanna County, 2016 WL 3654473 (M.D. Pa., July 8, 2016). County employee suspended for participation in union picketing brought Section 1983 claim alleging First Amendment retaliation. Copy of collective bargaining agreement, Due Process Letter, Suspension Letter, and pay stubs attached as exhibits to Defendant's Answer to complaint held to be written instruments incorporated into pleadings. Defendant entitled to judgment on pleadings due to demonstration of plaintiff's waiver of First Amendment right to participate in sympathy strikes contained in collective bargaining agreement.

Enforcement / Citations

Smith v. City of Philadelphia, 2016 WL 4607736 (Pa. Cmwlth., September 6, 2016). Plaintiff appeared before city administrative board after vehicle impounded, and informed of liability for outstanding parking tickets. After plain-

tiff argued he was victim of identity theft, board refused to release vehicle until payment was received. Plaintiff appealed to court of common pleas. Court held that City had failed to provide plaintiff procedural due process because City traffic code offered no method by which the accused could challenge whether City was proceeding against correct person. Court of common pleas exercised "equitable power" under Local Agency Law to resolve tickets in favor of Plaintiff based on oral arguments. Commonwealth Court held that although trial court was correct on due process issue, its order must be vacated because no provision of Local Agency Law authorizes factual findings and credibility determinations based on oral argument. Matter was remanded for a meaningful hearing, as determined by court of common pleas, on question of whether Plaintiff received notice of parking violations and whether violations belonged to him.

Employee Relations

Petroz v. Fox Chapel Borough, 143 A.3d 520 (Pa. Cmwlth., July 13, 2016). Appeal from court of common pleas affirming decision of borough council denial of disability pension benefit. Notwithstanding language in Borough Code authorizing less-restrictive definition of disability, collective bargaining agreement defining disability in accordance with Social Security disability requirements not prohibited by Act 600 and controlling. Review of challenge to disability pension denial by independent attorney consistent with due process where separate counsel represented

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parties and Borough council reviewed findings and conclusions. Disability pension not required as a matter of public policy where restriction on qualification was voluntarily negotiated.

City of Wilkes-Barre v. Fire Fighters Local Union No. 104, 143 A.3d 1050 (Pa. Cmwlth., July 20, 2016). Commonwealth Court affirmed court of common pleas denial of City's request to vacate a grievance arbitration award in favor of Union. The arbitrator concluded that City's effort to assign a case manager to monitor Heart and Lung Act benefits paid to firefighter was not authorized by parties' collective bargaining agreement. City had power to negotiate monitoring of Heart and Lung benefits and had operated without monitoring program for 24 years.

Johnson v. Lansdale Borough, 2016 WL 5463055 (Pa., September 28, 2016). Pennsylvania Supreme Court held that Borough Code and Local Agency Law may be read in *pari materia*. Consequently, trial court's standard of review of adjudication of municipal civil service commission where no new evidence is presented on appeal, which has been interpreted as providing for *de novo* review, is instead subject to deferential standard of appellate review as provided in Section 754(b) of Local Agency Law.

Land Use

Loughran v. Valley View Developers, Inc., 2016 WL 4386305 (Pa. Cmwlth., August 17, 2016). Commonwealth Court reversed and remanded trial court decision upholding zoning hearing board denial of dimensional

variance for residential structure. Board found that nonconforming lot on which proposed construction would occur had merged with commonly-owned adjoining nonconforming lot, notwithstanding lack of any merger of lots mechanism in township zoning ordinance. Commonwealth Court held that absent a merger of lots ordinance provision, application of doctrine is inappropriate. Further, board must issue written decision addressing five criteria for dimensional variances.

Dunbar v. Zoning Hearing Bd. of City of Bethlehem, 144 A.3d 219 (Pa. Cmwlth., July 18, 2016). Trial court affirmed in dismissal of appeal from zoning hearing board's grant of a special exception and variance. Nonconforming deli sought special exception to expand into nonconforming restaurant, and dimensional variance to increase square footage from 540 sq. ft. to 1080 sq. ft. Expansion held to be natural expansion of existing nonconforming use, and hardship sufficiently demonstrated to warrant dimensional variance.

DePolo v. Board of Supervisors Tredyffrin Township, 2016 WL 4525228 (3rd Cir. August 30, 2016). Appeal dismissed. Federal action of amateur radio operator arguing that a land-use variance only for 65-foot radio antenna rather than 180-foot antenna was preempted by federal regulation and ruling (47 C.F.R. §§ 97.15(b), "PRB-1"),

could not be considered on its merits because operator failed to pursue state judicial review of variance request. Decision of zoning board was final judgment on merits by state administrative agency acting in quasi-judicial capacity and failure to appeal to state court bound operator to the board's decision.

Municipal Elections

In re Constable, 2016 WL 3608789 (Pa. Cmwlth. July 6, 2016) (UNREPORTED). See 210 Pa. Code § 69.414). Language in Title 44 of Pennsylvania Consolidated Statutes (Constables) au-

"[The legislature evidenced its] intent to have ... the provisions of Act 13 operate to secure the health, safety, and property rights for all Pennsylvania residents during the oil and gas extraction process, without exception. Consequently, we do not conceive how ... [the] exclusion of notice to over three million of our Commonwealth's residents who receive their drinking water from wells—roughly a quarter of our population—that their health, or even their property, may be at risk as the result of a spill that has potentially jeopardized the safety of the water they consume, bears any fair and substantial relationship to this objective".

- *Robinson Twp. v. Commonwealth*

thorizing residents of townships of first class to elect second constable held not to be mandatory. Consequently, conversion of township of second class to one of first class did not create vacancy in "office" of second constable. Township retains discretion to place election of second constable on ballot; absent such action office does not exist.

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Open Records

Clearfield County v. Bigler Boyz Enviro, Inc., 144 A.3d 258 (Pa. Cmwlth., July 28, 2016). Commonwealth Court affirmed trial court reversal of Office of Open Records. Handwritten notes made by county commissioner concerning two unsolicited phone calls were not “records” as defined under the Right-to-Know Law. Notes were not produced or ratified by agency, and were not “of the local agency,” but were instead documenting citizen input and not agency transactions or activities.

Pennsylvania Constitution

Robinson Township v. Commonwealth, 2016 WL 5597310 (Pa., September 28, 2016). After “Robinson II”, 83 A.3d 901 (Pa. 2013), this decision reviewing the Commonwealth Court’s opinion in “Robinson III,” 96 A.3d 1104 (Pa. Cmwlth. 2014) further erodes the legal effect of Act 13 of 2012, the comprehensive amendment to the Commonwealth’s Oil and Gas Law. A majority of Pennsylvania Supreme Court held that Sections 3305 through 3309 of the Act which provided for review, enforcement and penalties related to violations of now unconstitutional uniform oil and gas land use standards could not be severed and are no longer capable of being executed. Provisions imposing restrictions on health professionals’ access to information about chemicals used in fracking process were held to violate Pennsylvania Constitution’s prohibition on special laws, because no reasonable distinction existed between oil and gas industry and other industries that have proprietary chemicals.

Further, Commonwealth Court was reversed on whether restriction of spill notifications to public water sources was a special law: Majority struck section as inconsistent with statute’s policy to protect all Pennsylvanians, but stayed its mandate for 180 days, during which public notification provisions would still be operative and General Assembly could enact remedial legislation. Finally, a provision authorizing any private corporation empowered to transport, sell or store natural gas or manufactured gas in Pennsylvania to seize subsurface lands of a private property owner for storage of natural gas, violates Fifth Amendment to United States Constitution and Article I, Section 10 of Pennsylvania Constitution by permitting a taking of private property for a private purpose.

Procurement

Scott Enterprises, Inc. v. City of Allentown, 142 A.3d 799 (Pa., July 19, 2016). Procurement Code provision authorizing penalty for contract payments withheld by government entities in bad faith (62 Pa.C.S. §3935) held to be discretionary, subject to an abuse of discretion appellate review.

Tax Sales

Swinka Realty Investments, LLC v. Lackawanna Cty. Tax Claim Bureau, 2016 WL 3618399 (M.D. Pa., July 1, 2016). Summary judgment for defendant Bureau. Removal of property from sale as redeemed under the Real Estate Tax Sale Law based on receipt of commitment letter from owner on same day as sale to successful bidder held not to constitute a deprivation of property

without due process. Although state law provides that “successful” bidder at an upset sale has equitable title to sale property, sale is not successful until redemption period lapses. Furthermore, plaintiff failed to submit evidence sufficient to support disparate treatment under a “class of one” equal protection claim. Additional claims for mandamus, breach of contract, and Fifth Amendment takings/just compensation failed for, among other things, no exercise of eminent domain power, lack of ripeness for failure to seek just compensation under state law, and preclusion of challenges by statutory confirmation of sale.

Legislative Updates:

Continued from page 1

HB 2186, PN 3728 amends Title 53 of the Consolidated Statutes (Municipalities) to provide that requirement necessitating one year of residency prior to election to municipal office is satisfied where a person returns from military service having previously established one year of residency and where the municipality remains the person’s domicile. HB 2186 passed House and given second consideration in Senate. *See also* SB 1300.

HB 782, PN 3928 amends Pennsylvania Construction Code Act to authorize use of alternative third-party agency by applicant in municipality that contracts with one third-party agency exclusively for enforcing the act. HB 782 passed House and given second consideration in Senate.

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