LOCAL GOVERNMENT COMMISSION
Quarterly Legal Update
Fall 2017

This autumn edition of the Commission's Update contains, in addition to notable legislation, state and federal adjudications of matters of first impression, including municipal standing for land use appeals, judicial reformation of municipal contracts and the First Amendment. Also decided was the landmark Valley Forge property tax assessment case setting forth the Pennsylvania Supreme Court's latest application of the Commonwealth's Uniformity Clause in the context of assessment appeals.

- Philip Klotz, Executive Director of the Local Government Commission

Legislative Updates:

SB 667, PN 888. Amends the Urban Redevelopment Law to authorize redevelopment authorities to exercise powers consistent with those granted to land banks under the Pennsylvania Land Bank Act; specifically, "to acquire tax delinquent properties at a judicial sale without competitive bidding, discharge tax liens on those properties, and share up to 50% of the real property taxes for five years after conveyance of authority-owned property." (*see* co-sponsor memo). SB 667 passed by Senate and referred to the House Urban Affairs Committee.

Act 54 of 2017. Amends Title 53 (Municipalities Generally) of the Consolidated Statutes to establish uniform residential qualifications of office for election to, or appointment to fill a vacancy in, a municipal elected office where recent service in the military might interfere with the person's ability to satisfy residency requirements. This legislation was sponsored by the Local Government Commission.

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Civil Rights

Fields v. City of Philadelphia, 862 F.3d 353 (3rd Cir., July 7, 2017). Appellants attempted to record police officers carrying out official duties in public and were retaliated against by, in one case, being pinned against a wall and, in another, being arrested and cited, and having a phone confiscated and searched. District court concluded that neither Plaintiff had engaged in First Amendment activity because the conduct, the act of recording, was not sufficiently expressive. Third Circuit reversed, holding that under the First Amendment's right of access to information, public has the right to record police officers conducting official police activity in public areas. Court also held that insufficient "fair warning" of the status of the right in the jurisdiction entitled officers to qualified immunity. Case remanded for determination of municipal liability.

Freedom From Religion Found., Inc. v. County of **Lehigh**, 2017 WL 4310247 (E.D. Pa., September 28, 2017). Plaintiffs challenged county seal as violating Establishment Clause of the First Amendment seeking declaratory and injunctive relief. Upon adoption of the seal in 1944, a county commissioner was quoted describing a cross over which the county courthouse is superimposed in the center of the seal as representing "Christianity and God-fearing people which are the foundation and backbone" of the county. Summary judgment granted in favor of plaintiff. County did not articulate a secular purpose for the symbol within the seal. Court also held that the symbol's prominence would lead a reasonable observer to conclude that the county was endorsing Christianity.

Knick v. Twp. of Scott, 862 F.3d 310 (3rd Cir., July 6, 2017). Appellant cited for violating township cemetery ordinance authorizing officials to enter upon any property within township to determine the existence and location of any cemetery, and compelling property owners to hold their private cemeteries open to public during daylight hours. Appellant filed Section 1983 action alleging violation of her Fourth, Fifth and Fourteenth Amendment rights. Because trial court determined that "search" of her property for a cemetery was an "open field" search and thus not entitled to Fourth Amendment protections, her rights were not violated. Third Circuit determined that appellant had not yet demonstrated a cognizable injury and consequently lacked standing, and could not adequately claim that anyone's rights were

imminently in jeopardy. Furthermore, Third Circuit affirmed district court dismissal of takings claim for want of an exhaustion of state remedies.

Code Enforcement

City of Williamsport Bureau of Codes v. DeRaffele, 2017 WL 3878796 (Pa. Cmwlth., September 6, 2017). City adopted a standard 2003 property maintenance code in 2004. In 2015, appellee was cited for violating a provision of the 2015 version of the standard property maintenance code, alleged to have been incorporated by reference into the city's ordinances. Commonwealth Court held that provision of Third Class City Code, 11 Pa.C.S. 11018.13, did not permit the city to automatically enact standard code changes that may occur in the future, and such an interpretation would result in an unconstitutional delegation of legislative authority to standard code council.

Contracts

Clearwater Construction, Inc. v. Northampton County Gen. Purpose Auth., 166 A.3d 513 (Pa. Cmwlth., July 10, 2017). Disappointed offeror brought suit challenging propriety of contract award under Public-Private Transportation Partnership Act (P3 Act), 74 Pa.C.S. §§ 9101-9124. In a matter of first impression, Commonwealth Court held that legislative intent and legislative history of the underlying act required an interpretation restricting standing to challenge contract awards to "development entities," defined as entities that are parties to contracts under the act.

Economic Development

Schock v. City of Lebanon, 167 A.3d 861 (Pa. Cmwth., August 4, 2017). City attempted to create a business improvement district pursuant to Neighborhood Improvement District Act, Act 130 of 2000, and subjected final plan to veto by district property owners in accordance with Section 5 of the act. Issue on review was whether the language requiring 40% of "affected property owners" should be interpreted as including only those properties subject to an assessment, or all property owners within district. After an extensive application of principles of statutory construction against the language of the act, Commonwealth Court held, in part, that because not all properties benefited by the improvements will be assessed, act should be interpreted as requiring vote by owners of 40% of all properties within the district.

> *"[T]his case is not about whether Plaintiffs expressed themselves through conduct. It is whether they have a First Amendment right of access to information about how our public servants operate in public.*
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> *Every Circuit Court of Appeals to address this issue . . . has held that there is a First Amendment right to record police activity in public. . . . Today we join this growing consensus. Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."*
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> - *Fields v. City of Philadelphia*

Eminent Domain

Condemnation by N. Strabane Twp. Mun. Auth., Washington County, 2017 WL 3567913 (Pa. Cmwlth., August 18, 2017)(UNREPORTED-See 210 Pa. Code § 69.414). Appellants filed preliminary objections to taking of a sewer easement by authority. Declaration of taking, in addition to the easement, "purported to condemn [appellants'] property 'in and about, on and around the said right of way and easement, for any purpose whatsoever . . . .'" Commonwealth Court held that this language was excessively broad, and also invalidated taking on the grounds that the plot plan was insufficient to enable a landowner or surveyor to reasonably discern the area taken, notice of condemnation was not properly provided, and authority failed to provide bond.

In Re Mountaintop Area Joint Sanitary Auth., 166 A.3d 553 (Pa. Cmwlth., July 12, 2017). Landowner petitioned court for appointment of a board of view, alleging that authority's discharge of sewage onto her property effected a de facto condemnation. Landowner alleged that authority knew that system was prone to overloads that would cause infiltration of sewage onto her

property, but, nevertheless, allowed additional properties to connect to its system, thereby increasing the number of such overloads. Commonwealth Court affirmed trial court's overruling of preliminary objections, holding that landowner was not limited to an action in trespass. Court distinguished contrary precedent by noting that authority's intentional operation of the system with knowledge of consequences to landowner's property made condemnation proceedings appropriate. Furthermore, authority waived six-year statute of limitations by not preserving the issue through preliminary objections, and trial court was correct in determining that condemned easement was continuous for five years despite separate sporadic overflow incidents.

Employment

Murray v. Willistown Twp., 169 A.3d 84 (Pa. Super., August 17, 2017). Former township manager entered into a retirement severance agreement with township, which included continued participation in group life insurance plan benefits he enjoyed as an employee. Each party was unaware that the plan reclassified retirees with a significantly reduced benefit. Upon learning that township could not legally provide an individual policy consistent with the agreement, manager brought action asserting claims for breach of contract, specific performance and unjust enrichment, and township sought a declaration that severance agreement's life insurance provision was invalid, and in the alternative, brought a claim for reformation. Trial court granted summary judgment in favor of township and the manager appealed. In a matter of first impression, Commonwealth Court affirmed, holding that trial court appropriately reformed contract to continue coverage, but at reduced benefit.

Barnard v. Lackawanna County, 2017 WL 4233030 (M.D. Pa., September 25, 2017). Plaintiff suffered a work-related injury and was medically restricted to part-time hours. Upon request to return to work, she was informed that she could not return until such time as she had no physical restrictions. Plaintiff was a member of a bargaining unit covered by a collective bargaining agreement (CBA) establishing as an "essential term of employment," an 8-hour work day. Plaintiff filed an action under Americans with Disabilities Act (ADA), alleging discrimination, failure to provide reasonable accommodation, and retaliation. District court granted county's motion to dismiss on all counts, agreeing that "since [plaintiff] alleges that she was unable to work the hours as defined by the CBA, she was unable to perform the 'essential functions' of the job," and therefore the possibility of part-time work did not make her a "qualified individual" for purposes of an ADA claim. Furthermore, Court noted that an employer is under no obligation to remove an essential function from the position in order to comply with ADA. Retaliation claim was dismissed because an alleged failure to provide reasonable accommodation alone may not be the basis of a retaliation claim.

Land Use

Board of Comm'rs of Cheltenham Twp. v. Hansen-Lloyd, L.P., 166 A.3d 496 (Pa. Cmwlth., July 6, 2017). Developer filed a preliminary sketch plan for age-restricted housing in 2008 in accordance with age-restricted development overlay district, which required special exception approval. In 2010, the 2008 ordinance was repealed, and after two years a 2012 age-restricted overlay was reenacted with an increase in dimensional requirements, still requiring a special exception. Developer did not file a zoning application until 2012. In 2015 developer filed special exception application pursuant to the 2008 ordinance. Commonwealth Court held, in a matter of first impression, that submission of mandatory sketch plan creates a vested right for purposes of zoning ordinance in effect at the time of the plan submission. Furthermore, zoning hearing board's determination that setback calculation could include property in adjoining municipality was appropriate and board did not issue an "advisory opinion" with regard to ordinance applicable to application.

Giant Food Stores, LLC v. Penn Twp., 167 A.3d 252(Pa. Cmwlth., July 18, 2017). Appellant appealed from trial court's order granting township's motion to quash appeal from township's denial of a request for an intermunicipal transfer of a restaurant liquor license. Trial court held that appellant must apply to Pennsylvania Liquor Control Board (PLCB) to transfer license without first obtaining the necessary municipal approval, wait for the

PLCB to deny the application, and then appeal from PLCB's decision pursuant to Section 464 of the Liquor Code, which authorizes appeals from PLCB decisions to trial court. Commonwealth Court reversed, holding that denial of the inter-municipal transfer constituted an adjudication appealable under the Local Agency Law, 2 Pa.C.S. §§ 551-555, 751-754, despite express language in the Liquor Code prohibiting appeals.

Cornell Narberth, LLC v. Borough of Narberth, 167 A.3d 228 (Pa. Cmwlth., July 14, 2017). Developer was led to believe by borough and building inspector that automatic sprinklers would not be required in proposed dwellings in subdivision. Upon refusal of borough to issue certificates of occupancy, developer brought suit for damages alleging breach of contract, promissory estoppel, negligent representation against inspector, and various violations of equal protection. Trial court granted summary judgment in favor of borough and inspector. Commonwealth Court affirmed, holding that a building permit is not a contract subject to a claim for breach, and promissory estoppel claim actually sounded in tort and was barred by the Tort Claims Act. Furthermore, building inspector was an "employee" acting on behalf of the borough and was thus immune from negligent representation claim under Claims Act. Developer also failed to assert a "class of one" equal protection claim because failure to require similarly situated properties to install sprinkler systems does not "mean the Borough acted deliberately to deprive [developer] of property rights."

Marshall v. Charlestown Twp. Bd. of Supervisors, 169 A.3d 162 (Pa. Cmwlth., August 29, 2017). Supervisors appealed trial court's reversal of their decision to deny owners' conditional use application with regard to certain nighttime operations and imposition of certain conditions on daytime operations. Owners named board of supervisors as appellee in appeal to trial court. In addition to reversing trial court on the merits of the conditional use challenge, Commonwealth Court held that the board of supervisors, despite being the adjudicatory body in the original decision, was permitted to appeal the trial court order, distinguishing case law applicable to zoning hearing boards.

Municipal Distress

Fraternal Order of Police Fort Pitt Lodge No. 1 v. City of Pittsburgh, 167 A.3d 245 (Pa. Cmwlth., July 17, 2017). Award after arbitration between distressed city and its police was appealed by police directly to Commonwealth Court on grounds that the award was "a deviation from the 2014 [Act 47 of 1987 Recovery] Plan because it does not ensure the competitive compensation required by the 2014 Plan." Consequently, Section 252(e) of Act 47 permits Commonwealth Court to review the award. Commonwealth Court quashed the appeal, holding that award was not a deviation from the Act 47 plan because the plan did not expressly require increases in compensation as a condition of maintaining competitive compensation. Furthermore, an argument that the Act 47 plan workforce allocations were inappropriate does not alter the fact that award was consistent with those allocations, and consequently, appeal should have been taken to court of common pleas.

Municipal Services

Borough of Ellwood City, Lawrence County v. Heraeus Electro-Nite Co., 167 A.3d 273 (Pa. Cmwlth., July 25, 2017). Borough discovered that it had been under billing company for electric service for 17 years. Borough filed a municipal claim for the difference. Electricity was supplied to company pursuant to a voluntarily executed "Request for Electrical Service" in 1996, which was consistent with borough ordinance requiring "a written application accepted by the Borough or other form of contract" prior to supplying service. Commonwealth Court held that borough ordinance itself precluded back-billing and established that lien was invalid because it derived from a voluntary contractual relationship "rather than statutory authority."

FP Willow Ridge Assoc. v. Allen Twp., 166 A. 3d 487 (Pa. Cmwlth, July 6, 2017)-- Developer contested propriety of sewer tapping fees for apartment complex by filing suit and then by subsequently claiming a refund under "The Refund Act," 72 P.S. § 5566b. Trial court dismissed developer's claim that fees were not "reasonable and uniform" as being time-barred, and the issue was not preserved for appeal. Commonwealth Court held that although developer failed to file "a written and verified claim for the refund of the payment" within a three-year notification period,

Refund Act claim was not time-barred given the law's operation as a statute of notification, not limitation. Therefore, as trial court properly recognized, it erred in dismissing developer's claim under the Refund Act. The Refund Act, however, merely provides "the mechanism for recouping illegal fees, but not for establishing their illegality." Consequently, failure of developer to preserve fee challenge resulted in nothing upon which to sustain a declaratory judgment action for a claim under the Refund Act.

Open Records

California Univ. of Pa. v. Schackner, 168 A.3d 413 (Pa. Cmwlth., August 22, 2017). Appellee requested certain records of correspondence related to university parking garage. University partially denied request, withholding records of correspondence related to investigation of cause of structural failure of the garage and other records related to internal, predecisional deliberations. Office of Open Records (OOR), upon appeal, compelled disclosure of additional records, prompting university to appeal. Commonwealth Court held that records gathered in order to determine cause of garage collapse were not entitled to "noncriminal investigation" exemption because fact finding related to the cause of collapse was not part of the university's "official duties." Furthermore, records claimed as exempt as "predecisional deliberations" were, rather, subjects involved in deliberations and the university did not detail "how the withheld items relate to the [university's] future course of action." With regard to records claimed as exempt under attorney-client privilege, Commonwealth Court agreed with OOR that insufficient justification existed for the exemption, but remanded to OOR for *in camera* review.

Property Tax

Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist., 163 A. 3d 962 (Pa., July 5, 2017). School district, on advice of consultant, chose to appeal assessments solely on commercial properties, including apartment complexes, on the basis that such properties were of greater value than residential property, and that political consequences of appealing residential property assessments were greater. After rejecting school district's separate motions to quash the appeal, Pennsylvania Supreme held that school district's targeting of commercial property for appeals was an impermissible subclassification of real property prohibited by the Uniformity Clause of the Pennsylvania Constitution.

> *From the . . . precepts we have discussed—that all real estate in a taxing district forms a single collective class to be treated uniformly, and that systematic disparate enforcement of the tax laws based on property sub-classification, even absent wrongful conduct, is constitutionally precluded—it follows that a taxing authority is not permitted to implement a program of only appealing the assessments of one sub-classification of properties, where that sub-classification is drawn according to property type—that is, its use as commercial, apartment complex, single-family residential, industrial, or the like.*
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> - *Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist.*

Legislative Updates:

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Act 44 of 2017. Amends the Fiscal Code by, among other things, authorizing a municipal authority to replace or remediate private water and sewer laterals for customers of the authority if the authority deems the work will benefit the public health, public water supply system or public sewer system. The authority may use public funds and authority employees to conduct the work and construct and maintain water or sanitary sewer pump stations, public water distribution systems, public sewer collection systems or similar general construction services within the service area of the authority, or to do so by contract or agreement.