LOCAL GOVERNMENT COMMISSION
Quarterly Legal Update
Fall 2018

As the holiday season begins in earnest, the Commission presents to you an early gift of some case law and statutory highlights from the past several months. Included in our write-ups is an important case from the Third Circuit examining the due process rights of landlords when property is subject to liens for tenant bills, a major change from the Pennsylvania Supreme Court in governmental immunity related to vehicles, a clarification from the same high court on municipal tax authority preemption, and a cautionary tale on the terms of long term leases of municipal public projects. Additionally, the Commission had a productive session with regard to legislation, some of which is described herein.

- Happy Holidays to one and all! Phil Klotz, Executive Director

Legislative Updates:

Act 99 of 2018. Amends the Borough Code to permit borough council to enter into contracts or make purchases without advertising, bidding or price quotations for specified maintenance and emergency related purposes.

Act 101 of 2018. Amends the Municipal Waste Planning, Recycling and Waste Reduction Act to exempt a municipality other than a county from establishing a leaf waste collection program provided that: the municipality has a population of more than 5,000 people and a population density of 500 or fewer people per square mile, and the municipality has enacted an ordinance prohibiting the burning of leaf waste.

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Civil Rights

Palardy v. Township of Millburn, 2018 WL 4655942 (3rd Cir., September 28, 2018). Retired New Jersey township police officer brought 42 U.S.C. § 1983 First Amendment retaliation claims against Township and business administrator alleging that he was unlawfully prevented from becoming chief of police because business administrator objected to his union membership and activity. The district court held officer's union-related speech and association were not constitutionally protected and granted summary judgment in favor of the Township and business administrator. The Third Circuit determined that the district court should have analyzed the speech and association claims separately and that the association with the union deserves constitutional protection. However, officer's speech claim must fail because it is indistinguishable from his associational claim. Therefore, the court affirmed in part, reversed in part, and remanded.

Hammon v. Kennett Township 2018 WL 4026542 (3rd Cir., August 22, 2018). Plaintiffs sued Township, township supervisors and officer under 42 U.S.C. § 1983 alleging a substantive due process violation based on theories of state-created danger and *Monell* liability, as well as various state law claims. In 2008, officer suffered brain trauma that caused him to have a seizure within 24 hours of the injury. He notified the Township and continued to work until 2011. While driving a police cruiser on the job, he suffered another seizure and rear-ended another car. He immediately stopped driving and notified the Township, the DMV, and the public and worked with the Township, resulting in his taking medical leave and his driver's license being suspended. The officer voluntarily submitted to neurological tests every three months after the initial accident, and was, following his medical leave, permitted to return to active duty, which included driving. In 2015, he had another seizure while driving on duty resulting in his vehicle striking Plaintiff's vehicle and injuring Plaintiff. The district court dismissed the case and the Third Circuit affirmed. The actions of all Defendants were not sufficiently

egregious as to "shock the conscience" through deliberate indifference for purposes of a state created danger. Furthermore, Plaintiffs were not differentiated from the general public as foreseeable victims and the Township's authorization for officer to return to work was not an "affirmative act" for purposes of the theory.

Augustin v. City of Philadelphia, 897 F.3d 142 (3rd Cir., July 18, 2018). Between 2009 and 2012, City gas works repeatedly filed thousands of dollars' worth of liens against Plaintiffs' properties on account of tenant arrearages dating back as far as 2004. Plaintiffs first learned of the liens in 2011, when the utility sent pre-filing notices to their home addresses, rather than tenant addresses as used for previous notices. Plaintiffs and other class members sued and prevailed at the district court, alleging that City lien system violated their due process rights. The Third Circuit reversed. Although district court was correct in establishing that the filing of a lien was of sufficient gravity to implicate due process, the overall effect on owner rights was minimal: they still controlled and could convey the property without a significant effect on value. Consequently, the minimal nature of the deprivation when weighed against the interests of the City and the relatively low risk of errors due to the nature of the lien and post-deprivation process compelled a conclusion that the lien system was constitutional.

Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, 327 F.Supp.3d 767 (M.D. Pa., July 9, 2018). Society sued transit system (COLT) pursuant to 42 U.S.C. § 1983, alleging that bus advertising policy refusing to run advertisements containing the word "atheists" is an impermissible content and viewpoint-based restriction in violation of its First Amendment rights. Judgment in favor of COLT. The bus advertising space was a "limited forum" rather than a designated forum as argued by Plaintiff. Consequently, the advertising policy need only be reasonable and viewpoint-neutral, and Plaintiff's argument that COLT favored non-religious/atheist speech over religious/atheist speech was a content-based, not viewpoint based distinction inoffensive for the type of forum. Furthermore, the policy is reasonable in light of COLT's stated goals to preclude a decrease in ridership and revenue due to controversial subjects and safety concerns for riders.

Brown v. Delaware County Prison Board of Inspectors, 2018 WL 3323349 (3rd Cir., July 6, 2018). Plaintiff filed 42 U.S.C. § 1983 action against correctional facility, doctor, deputy warden and board of prison inspectors for deprivation of Eighth Amendment rights. On appeal from district court granting Defendants' motion to dismiss, the Third Circuit affirmed in part, vacated and remanded. By alleging that Defendant deputy warden had visited him and had been informed that he had been deprived of food, clothing and basic essentials, Plaintiff sufficiently alleged both serious deprivation of basic necessities and deliberate indifference for purposes of Eighth Amendment claim. Remaining claims as to deputy warden for alleged assault, and doctor for deprivation of medical attention, were properly dismissed for insufficient allegations of deliberate indifference. Furthermore, claims against facility and board were properly dismissed for insufficient allegations of a policy or custom attributable to a constitutional deprivation: Plaintiff offered only "vague and conclusory" statements that Defendants had failed to "provide adequate levels of security staffing" and failed to allege any analogous prior conduct pointing to a policy.

Contracts

Borough v. Middletown Water Joint Venture LLC, 2018 WL 3473972 (M.D. Pa., July 19, 2018). Borough entered into contract to lease municipal water and wastewater system to Defendant. The contract contained a "demand shortfall recovery provision" permitting Defendant to add a surcharge on service bills notwithstanding negotiated rate caps in the event water sales fail to meet established thresholds. The provision was discussed and underwent amendment during negotiations. After execution of the contract, Defendant began imposing the recovery surcharge in an amount objectionable to Borough. Furthermore, Borough alleged faulty meter issues were central to calculations of the shortfalls. The Borough sued for reformation of the contract on a theory that the shortfall provisions do not represent the intent of the parties. The matter was removed to federal court. Pending resolution of the matter,

the Borough moved for a preliminary injunction on the imposition of the surcharge to customer bills. The district court denied the injunction finding that the Borough was not likely to prevail on the merits to reform the contract either under mutual or unilateral mistake given the sophistication of the parties, the fact that the provision was negotiated, and that the Borough did not object to shortfall calculations in the periods leading up to the date triggering the surcharge. Furthermore, the Borough failed to provide sufficient evidence that the quantity of the meter deficiencies, if remedied, would "appreciably affect" the calculated shortfall recovery amount. Finally, "irreparable harm" was not proven given the possibility that an award of money damages could address any harm to the community and ratepayers.

Economic Development

Vetri Navy Yard, LLC v. Department of Community and Economic Development of Commonwealth, 189 A.3d 1137 (Pa. Cmwlth., July 16, 2018). Petitioner constructed and operated a restaurant in the Philadelphia Navy Yard Keystone Opportunity Improvement Zone (KOZ) in 2013, for which it had received benefits under the Keystone Opportunity Zone, Keystone Opportunity Expansion Zone and Keystone Opportunity Improvement Zone Act in the form of state and local personal and property tax incentives. Petitioner sold the restaurant to another business on January 30, 2016. Under Section 902(a) of the Act, when a "qualified business" "relocates" outside a KOZ within a certain time period, KOZ benefits are subject to recapture. The restaurant continued to operate under the new ownership, and petitioner argued that it still maintained offices in a different part of the KOZ. The department (DCED) division monitoring compliance with the act determined that Petitioner was subject to a recapture of tax benefits and denied a waiver of the penalty. The Secretary of DCED affirmed the denial. Commonwealth Court affirmed in part and reversed in part. Despite petitioner's argument that "relocate" as used in the act requires a physical relocation of the same business and the restaurant was still operating, albeit under different ownership, the court determined that a broader "no longer actively conducting business within the KOZ" is more consistent with the purpose of the statute and provisions indicating that the act should be interpreted in favor of the Commonwealth. Furthermore, the court agreed that the Secretary did not abuse his discretion in denying a waiver or modification of the recapture. The court, however, did find that DCED exceeded its authority by denying KOZ benefits for January 2016, a period during which petitioner qualified, solely because it was disqualified when it applied in March 2016.

Employment

Long v. Southeastern Pennsylvania Transportation Authority, 903 F. 3d 312 (3rd Cir., September 10, 2018). Plaintiffs who were convicted of drug offenses applied to authority for employment involving the operation of vehicles. Plaintiffs consented to background checks and were ultimately denied employment. The authority did not send Plaintiffs copies of their background checks before it decided not to hire them, and did not send them notices of their rights under the Fair Credit Reporting Act (FCRA), both of which were required by that law. Plaintiffs filed a putative class action complaint based on these two FCRA violations. The District Court granted the authority's motion to dismiss for lack of standing. It concluded there was only a "bare procedural violation," not a concrete injury in fact, because Plaintiffs alleged that the authority denied them employment based on criminal records they willingly disclosed, and the violations of the FCRA did not give rise to a de facto injury. The Third Circuit affirmed in part, reversed in part and remanded. Applying the tests from *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1545, 194 L.Ed.2d 635 (2016), as revised (May 24, 2016), the court determined the failure to provide consumer reports prior to adverse employment action as required by the FCRA was intended by Congress to be a redressable injury in fact, and the injury in question was similar to harms traditionally recognized under common law, namely harms that affect an individual's ability to control private information about them. The failure to apprise Plaintiffs of their rights under the FCRA was not, however, an injury in fact given that they were sufficiently apprised of their rights to bring the litigation.

Thanhauser v. Douglass Township, 190 A.3d 786 (Pa. Cmwlth., July 18, 2018). Plaintiff officers retired in 2005 and 2009 from Township police force, at which time the operative collective bargaining agreement (CBA) and awards, and subsequent revisions, provided essentially that officers and their spouses were entitled to receive "comparable health insurance benefits for the life of the retired officer." The CBAs also provided that the grievance procedure was "limited to the matters involving the interpretation of [the CBA,]" but that "failure to implement an award, administratively or legislatively, is enforceable . . . as an unfair labor practice, or by a mandamus action in the courts." In 2010 Township changed health coverage to the dissatisfaction of the officers. Although they continued coverage under new benefits, they invoked the grievance process but discontinued it in 2013 when they sought mandamus relief to compel the Township to provide them with "comparable" coverage. After filing an amended complaint in 2014, Township did not file an answer with new matter for three years, at which time it asserted the dispute must be resolved through the grievance process. Officers moved to strike the answer and new matter as untimely, alleging reliance on the Township's inaction as admitting the allegations and waiving any defenses. The trial court struck the answer and new matter. The Township filed a separate motion to dismiss based on lack of jurisdiction because officers' claims arose from a dispute under the CBAs, and were subject to mandatory statutory arbitration. In addition, Township argued the mandamus claims were barred by the six-month statute of limitations. The trial court granted Township's motion to dismiss. Commonwealth Court agreed. Because construction of the term "comparable" under the CBA is necessary for resolution of the dispute, arbitration was required and trial court determination that it lacked jurisdiction was not affected by Township delay. Furthermore, coordinate jurisdiction rule did not require that trial court striking of answer and new matter as untimely barred a subsequent determination that the court lacked jurisdiction.

Governmental Immunity

Gohrig v. County of Lycoming, 2018 WL 4515960 (Pa. Cmwlth., September 21, 2018)(UNREPORTED- See 210 Pa. Code § 69.414). Plaintiff was injured after attempting to cycle around gravel that had "washed down" on to a paved portion of the Susquehanna Riverwalk and Timber Trail. The County owned the trail and the City of Williamsport was responsible for trash removal and maintenance of the relevant portion of the trail. Plaintiff and his wife sued the County and City for negligent maintenance of the trail alleging that the real property exception to governmental immunity applied in the matter. The trial court granted the municipal motion for summary judgment and the Commonwealth Court affirmed. Plaintiffs failed to provide any evidence of a design defect in the trail or any evidence of negligent maintenance, instead "[the] claims are predicated entirely on [Plaintiff's] subjective belief that the *mere presence* of the gravel" was sufficient to prove negligence of the County and City. Given that a fact-finder would have "no choice but to speculate" about factual issues and could not reasonably conclude from the record that a Defendant was negligent and the negligence was the proximate cause of the injury, summary judgment in favor of the Defendants was appropriate.

In her dissenting opinion in [Warrick v. Pro Cor Ambulance, Inc., 739 A.2d 127 (1999)], Justice Newman recognized that operation of a vehicle "reflects a continuum of activity," . . . which entails "a series of decisions and actions, taken together, which transport the individual from one place to another. The decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off, and the like, are all part of the 'operation' of a vehicle." . . . This definition, which we adopt today, creates a reasonable standard that comports with the intent of the General Assembly and avoids the illogical results that have flowed from the emphasis on motion in [Love v. City of Philadelphia, 543 A.2d 531 (1988)] and its progeny.

- *Balentine v. Chester Water Auth.*

Balentine v. Chester Water Authority, 191 A.3d 799 (Pa., August 21, 2018). Estate of deceased contractor sued authority after authority inspector parked vehicle in roadway adjacent to where decedent was working and collision forced parked vehicle into decedent causing death. The trial court dismissed all claims against the authority and the inspector, determining that neither the motor vehicle exception nor the traffic control device exception applied to circumvent governmental immunity. A divided panel of the Commonwealth Court affirmed, holding as a matter of first impression that the vehicle was "no longer in operation" when the accident occurred. The Pennsylvania Supreme Court reversed and remanded, overruling *Love v. City of Philadelphia*, 543 A.2d 531 (1988) and holding that a constrained definition of "operating" is inappropriate, and that operation involves a continuum of actions including parking, using lights and whether to turn. Consequently, Plaintiff has established a prima facie cause of action for negligence "based on acts that constitute the operation of a vehicle," and the vehicle liability exception to immunity applies.

Land Use

Tower Access Group, LLC v. South Union Township Zoning Hearing Board, 192 A.3d 291 (Pa. Cmwlth., July 30, 2018). Plaintiff applied for, and was granted, a zoning certificate to build a communication tower by Township zoning hearing board. The township supervisors subsequently revoked Plaintiff's zoning certificate, noting that the proposed site for the tower was located in a zone permitting "public service facilities" by special exception. Plaintiff thereafter filed an application with the Board seeking to appeal the action by the supervisors and, alternatively, seeking a special exception for the tower. The board found procedural errors in the issuance of the initial certificate and, consequently, denied relief on the issue of the action of the supervisors. On the special exception, the board concluded that the proposed site "was not suitable for the construction and use as set forth in the application[,]" the "proposed use has not met the requirements of the [Township's] Zoning Ordinance[,]" "[t]here was no testimony presented ... by [plainitff] to meet the burden of proving that a special exception should be granted in the instant case[,]" and Plaintiff did not present any evidence to rebut "the testimony presented by the Objectors and the Township that the special exception should not be granted." The trial court affirmed and the Commonwealth Court reversed and remanded. Commonwealth Court held that the board "erred by misapplying the burdens of presentation and proof applicable to special exception applications," finding that Plaintiff "presented sufficient evidence establishing that it complied with the specific requirements of the ordinance, thereby shifting the burden to the Township and/or Objectors to establish that the proposed use would be detrimental to the public health, safety, or welfare." Furthermore, insufficient evidence was presented by the Township and Objectors to satisfy a "high degree of probability that the impact from the proposed use will substantially affect the health, safety and welfare of the community to a greater extent than would be expected normally from that type of use."

Police Powers

Rufo v. Board of License and Inspection Review, 192 A. 3d 1113 (Pa., September 13, 2018). Plaintiff alleged that Philadelphia Property Maintenance Code (Code) provisions requiring owners of vacant buildings that are a "blighting influence" to secure all spaces designed as windows with working glazed windows and all entryways with working doors was an unconstitutional exercise of the City's police power. The trial court agreed, and the Commonwealth Court affirmed, declaring the ordinance unconstitutional because the ordinance was focused on aesthetic concerns rather than the risks associated with blight. The Pennsylvania Supreme Court vacated and remanded for consideration of Plaintiff's other issues. The court noted initially that the lower courts improperly imposed the burden of proving the constitutionality of the ordinance on the City, but nonetheless adjudicated the constitutional propriety of the ordinance. The Supreme Court held that the City adequately "explained the basis for its use of its police powers, its rationale for passing the ordinance, and the result it trusted the ordinance would achieve in the fight against blight." Furthermore, Plaintiffs "failed to offer any evidence or persuasive argument to overcome the presumed constitutionality of the City's exercise of its legislative prerogative in furtherance of its

compelling interest in combatting blight." The court held that remand was necessary for consideration of Plaintiff's vagueness and confiscatory fines arguments, which were not reached in the courts below.

Taxation

Williams v. City of Philadelphia, 188 A.3d 421 (Pa., July 18, 2018). Appellant retailers, distributors, producers, and trade associations commenced the present civil action against Defendants challenging the legality and constitutionality of "beverage tax" on certain sweetened beverages collected when beverages are transferred from a distributor, wherever located, to a City "dealer," and seeking declaratory and injunctive relief. In relevant part, Appellants argued that statute granting City broad taxing authority, the Sterling Act, prohibited on City from imposing duplicative taxes, i.e., any tax on a transaction or subject "which is now or may hereafter become subject to a State tax ...." The trial court granted summary judgment in favor of the City and a divided *en banc* Commonwealth Court affirmed. The Pennsylvania Supreme Court affirmed. Proper measure of whether a tax is duplicative of state tax is on the basis of "legal incidence" rather than post-tax, downstream "economic incidence" absent any legislative intent to the contrary, and the "subject" of the state sales tax is "sale[s] at retail." Consequently, the beverage tax has "different subjects, measures, and payers" and is not implicated in the preemption provision.

Legislative Updates:

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Acts 135, 136 and 137 of 2018. This legislative package amends the Borough Code, Third Class City Code, First Class Township Code, and an act related to incorporated towns to: (1) provide for publication in a newspaper of general circulation concise annual financial information, approved by the auditor(s) and consistent with the audited financial statements, as specified; (2) require that the newspaper publication include a reference to a place within the municipality where full copies of the annual financial reporting information may be examined; and (3) stipulate that if the full required annual financial reporting information is not published, a copy shall be supplied to the publishing newspaper when the request for publication is submitted. This legislative package was sponsored by the Local Government Commission.

Act 144 of 2018. Amends Title 75 (Vehicles) of the Pennsylvania Consolidated Statutes to further regulate parking spaces reserved for a "person with a disability," and authorize local authorities to limit access to a public parking space reserved for a person with a disability to a specific vehicle, license plate or other method of designation for a reasonable fee.

Act 155 of 2018. Amends the Consolidated County Assessment Law in Title 53 (Municipalities) of the Pennsylvania Consolidated Statutes to: (1) provide for the training and qualifications of members of a board of assessment appeals/revision and auxiliary appeal boards, with exceptions; (2) direct the County Commissioners Association of Pennsylvania in coordination with the Assessors' Association of Pennsylvania to establish a training curriculum and method of delivery; (3) direct that all exemption appeal hearings be conducted by the board of assessment appeals/revision; (4) change the method by which auxiliary appeal boards are established and staffed; (5) relating to countywide reassessment, clarify the types of corrections that may be made during an informal review of a property owner's proposed market value or assessment, and specify the date by which informal reviews must be completed; (6) require the county to make specified taxing district information publicly available; and (7) require the assessment appeals board to provide notice of rights of further appeal to board decisions. This legislation was sponsored by the Local Government Commission.

Act 156 of 2018. Amends Title 65 (Public Officers) of the Pennsylvania Consolidated Statutes to permit an agency to hold an executive session to discuss, plan or review matters and records that are deemed necessary for emergency preparedness, protection of public safety and security of all property in a manner that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection.