LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Spring 2018

Spring Greetings to all from the Local Government Commission. Included in this edition of our Legal Update is a significant case on the real estate exception to tort immunity, a case discussing standing in the context of agricultural security areas, and an interesting discussion by the federal court for the Eastern District of Pennsylvania of the issues at the heart of the recent "sanctuary city" actions being taken by the Department of Justice. Also included is our customary legislative update on the status of bills related to municipal law.

- Philip Klotz, Executive Director of the Local Government Commission

Legislative Updates:

HB 1887, **HB 1888**, and **HB 1889**. HB 1887 amends the First Class Township Code, HB 1888 amends the Borough Code and the Third Class City Code, and HB 1889 amends Act 34 of 1953 (relating to Incorporated Towns) to increase from $1,000 to $2,000 the value of municipal personal property below which the respective municipal governing bodies need not publicly advertise for bids when selling the municipality's personal property. Relatedly, each relevant municipal governing body would be able to utilize existing simplified procedures for sale of personal property below the $2,000 threshold. HB 1887, HB 1888 and HB 1889 were passed by the House. *See* also SB 947, SB 948, and SB 949. This bill package is sponsored by the Local Government Commission.

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Adverse Possession

City of Philadelphia v. Galdo, 2018 WL 1512959 (Pa. Cmwlth., March 28, 2018). City acquired parcel now adjoining that of Appellant by condemnation in 1974, and the Commonwealth filed a notice of condemnation for the property in 1976. City had not occupied or maintained the parcel since the late 1970s. Since the Appellant's acquisition of his own property in 1989, he used the parcel for various purposes, and improved it with, among other things, fencing, storage trailers, a fire pit and pavilion. In 2013, City posted the parcel, notifying the public to remove all personal property within 30 days. Appellant refused to comply with the notices and removed them. City filed a complaint against Appellant for continuing trespass, permanent trespass, and ejectment, and Appellant filed a counterclaim to quiet title, claiming ownership by adverse possession. The trial court found in favor of City and ordered Appellant ejected from the disputed property and he appealed. Commonwealth Court reversed and remanded. Consistent with existing case law, municipal property is subject to adverse possession when not devoted to public use. Furthermore, holding property for future sale is not a "public use" sufficient to immunize the property from such claims. The Court remanded the matter for a determination of whether the elements of adverse possession could be established by Appellant.

Civil Rights

Smith v. City of Philadelphia, Dep't of Licenses and Inspections, 285 F.Supp.3d 846 (E.D. Pa. 2018). Plaintiff brought religious discrimination (Title VII) claim alleging that he, a Catholic, was discriminated against by a superior, also a Catholic, because he disparaged the superior's more "stringent views" of the faith and was denied permanent employment. The City moved for summary judgment, arguing that Plaintiff cannot prove disparate treatment because of a lack of comparators, and that the record establishes nondiscriminatory, nonpretextual reasons he was not permanently hired. The District Court disagreed and denied summary judgment, holding that a lack of comparators does not preclude the claim and that plaintiff may show either more favorable treatment of another outside of the protected class or that circumstances of the adverse action gave rise to an inference of discrimination. Furthermore, there was evidence

from which a jury could reasonably conclude that the superior's criticism of Plaintiff was the moving force in his not being offered permanent employment. If that were the case, and if the criticism was in fact based upon Plaintiff's religious beliefs, such conduct would violate Title VII.

Carroll v. Lancaster County, 2018 WL 1317761 (E.D. Pa., March 14, 2018). Parents of pretrial detainee sued County, warden, sergeant, medical department company/staff and corrections officers after he committed suicide in county prison. Summary judgment granted to corrections officers and sergeant on Section 1983 claim because of the fact that detainee was intoxicated or withdrawing from drugs does not constitute a "particularized risk" of suicide sufficient to sustain the action, and officers' brief interactions with detainee did not otherwise demonstrate such vulnerability. Inconsistencies and open questions regarding intake forms and responses to detainee's sick call request prior to suicide do not preclude a conclusion that medical department company/staff were indifferent to detainee's suicide risk and, thus, claims against those parties survive summary judgment. County, warden and medical department company entitled to summary judgment on *Monell* "failure to train" claim because Plaintiffs failed to establish that either had "actual or constructive knowledge, and acquiesced in the alleged violations of suicide screening and monitoring procedures or failed to enact needed policies." Furthermore, County, warden and officers entitled to summary judgment on state law wrongful death and survival actions.

Employment

Exeter Twp. v. Pennsylvania Labor Relations Bd., 177 A.3d 428 (Pa. Cmwlth. 2018). Township and Union filed a joint request for certification under Public Employee Relations Act (PERA) with the Board to certify a unit of employees for collective bargaining purposes. The Board certified positions included in the bargaining unit, specifically excluding "management level employes, supervisors, first level supervisors, confidential employes and guards as defined by PERA." Township filed a petition for unit clarification with the Board, seeking to remove three positions from the unit certification, namely the zoning officer, the building code official, and the code enforcement/assistant zoning officer. At the hearing, Township chief administrative officer testified that zoning officer duties and responsibilities "are pretty well set out in the [Pennsylvania Municipalities Planning Code (MPC)]". Township offered the zoning officer's job description and Township ordinances regarding the duties of the position, which Board admitted into evidence. Board issued a final determination that Township did not meet its burden of proving its zoning officer was a management-level employee because it could not offer testimony regarding the actual duties performed by the zoning officer. Commonwealth Court reversed, holding that in accordance with established caselaw testimony of actual job duties is required to establish whether a position is "management level," except in cases where the General Assembly has designated a particular position as such. Because Section 614 of the MPC vests zoning officers with the power to "administer and enforce" zoning ordinances, they were considered managerial level employees and supporting testimony was not required.

Frungillo v. Bradford Reg'l Airport Operating, 2018 WL 1256743 (W.D. Pa., March 12, 2018). Plaintiff brought Family Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) claims against the regional authority and county responsible for appointing the authority board of directors. Plaintiff alleged that authority and county were "joint" employers given that the authority employs fewer than 15 employees and the threshold for a FMLA claim is 50 and an ADA claim is 15. Summary judgment granted in favor of the Defendants. Plaintiff produced insufficient evidence that county shared or codetermined "matters governing essential terms and conditions of employment"; the county did not have authority to hire or fire Plaintiff, did not pay Plaintiff from county accounts and did not supervise Plaintiff. Furthermore, the fact that a county commissioner also served as chairman of the authority board was insufficient to demonstrate joint employment. Because of overwhelming evidence contradicting joint employment, no genuine issue of material fact existed. The court declined to address Plaintiff's Pennsylvania Human Relations Act claims given a dismissal of all federal claims, and dismissed them without prejudice.

City of Philadelphia v. Fraternal Order of Police, Lodge No. 5, 181 A.3d 485 (Pa. Cmwlth. 2018). After a 2012 episode involving alleged use of excessive force,

City terminated police officer's employment and Union filed a grievance which resulted in a successful reinstatement of the officer. In 2015, officer was highest ranking candidate on promotion list and was interviewed by a promotion review board. Chairman of the board did not recommend the officer for promotion and the officer was ultimately bypassed. Union filed grievance and arbitrator issued an award requiring retroactive promotion of the officer. City appealed and the trial court vacated the arbitration award. On appeal, Commonwealth Court affirmed. The Court first distinguished a non-binding decision relied upon by the arbitrator and held that the he had no authority to determine what type of case he could decide. Neither the law nor the collective bargaining agreement permitted the arbitrator to adjudicate a promotion decision which is a matter of managerial prerogative. Furthermore, the trial court's vacation of the award was not a substitution of its own judgment, but rather a determination that the arbitrator exceeded his authority. Lastly, the Court noted that the arbitrator also exceeded his authority by awarding a promotion from a list that had expired.

Land Use

Berner v. Montour Twp. Zoning Hearing Bd., 176 A.3d 1058 (Pa. Cmwlth. 2018). On appeal after remand, Objectors to proposed intensive swine agricultural facility appealed the zoning hearing board determination, as affirmed by trial court, that the ordinance provision requiring the special exception applicant to submit facilities designs and legally binding performance guarantees to ensure operations will be conducted without "adverse impact" upon adjacent properties to be "subjective and vague," and thus, not required for approval. In the alternative, the requirement was, nevertheless, preempted by the Nutrient Management Act. Commonwealth Court, in reversing trial court on granting of special exception, held that the requirement was an objective requirement for specified submissions, and the ordinance set forth examples of "adverse impact." The Applicant failed to submit any evidence to satisfy the requirement. Furthermore, because the proposed facility did not require development of a nutrient management plan, it was not preempted by the Nutrient Management Act. Consequently the applicant was subject to the ordinance provision.

Attorneys [for community environmental rights organization] contend that because adverse precedent is acknowledged in supporting briefs, the duty of candor owed to the Court and other parties to the litigation has been met . . . . This position is equally untenable and unsupported by appropriate citation. Merely acknowledging historical fact does not cloak frivolous litigation with a mantle of seriousness. Instead, such litigation creates enormous expense to parties and taxes limited judicial resources. Rather, counsel's repeated presentation of identical theories over the course of fifteen years eliminates any claims of novelty or plausibility, and cannot be excused as a good faith course of conduct.

- *Penna. Gen. Energy v. Grant Twp.*

Pennsylvania General Energy Co. v. Grant Twp., 2018 WL 306679 (W.D. Pa., January 5, 2018). In an ongoing challenge to a township ordinance drafted and defended by community environmental rights organization attorneys, Company moved for sanctions pursuant to 28 U.S.C. Section 1927 one year after answer to initial complaint was filed. Given that motion was filed for conduct during the pleadings stage, and citing the court's discretion to dispose of such motions after summary judgment disposition, the court determined that the motion was timely, except with regard to one attorney. The court awarded sanctions against organization attorneys in the amount of $52,000, as measured by costs and fees reasonably related to motions opposed to "discredited theories" of law proffered by attorneys. As justification, the court noted that almost identical legal arguments had been offered, and defeated, in similar actions for over fifteen years.

SBA Towers IX, LLC v. Unity Twp. Zoning Hearing Bd., 179 A.3d 652 (Pa. Cmwlth., February 16, 2018). Tower Company (SBA) entered into a lease of property to construct a wireless tower facility in district requiring a special exception. SBA and Verizon applied for a permit and presented testimony of gap in coverage that would be remedied adequately by the tower location, provided tower height was at least 150 feet. No other locations or modifications of ex-

isting facilities would remedy the issue. County airport authority presented testimony that the proposed tower represented a danger to aviation. Board denied application, finding that SBA was not the named licensee of FCC, SBA did not demonstrate a good faith effort to find another location, SBA was not an appropriate applicant because it was a proposed leaseholder, and there was insufficient evidence of mitigation of human exposure to electromagnetic radiation and aviation concerns. Trial court reversed, and this appeal followed. Commonwealth Court reversed. First, Court addressed SBA's standing to apply for the permit, and held that because it could exercise the rights of a landowner under the lease option, SBA was a "landowner" for purposes of the application. The Court also held that the trial court committed error by conducting a *sua sponte* hearing when no party petitioned to introduce new evidence. The Court agreed, however, that SBA demonstrated good faith in attempting to find an alternative location, and provided sufficient evidence regarding airport safety and minimum height. On the issue of licensing, the Court agreed with the Board; there was no evidence that SBA is licensed by the FCC. Although the attorney for SBA stated on the record that the licensee was the parent company of Verizon, no evidence to this relationship was presented. The Court also agreed with the Board that a conclusory letter indicating that the tower would comply with FCC electromagnetic radiation safety standards was insufficient evidence.

Schwartz v. Chester County Agric. Land Pres. Bd., 180 A.3d 510 (Pa. Cmwlth., March 1, 2018). Appellant, filed a "formal complaint" with the Board alleging that a farm subject to an agricultural conservation easement was being used in a manner inconsistent with the easement. After site visits, the Board issued a letter concluding that the use of the farm was consistent with the terms of the easement and Appellant filed a petition for review with the trial court. The Board and farm operators filed a motion to dismiss on grounds of standing and that the letter was not an adjudication. The trial court denied the motion to dismiss and denied the petition. Appellant appealed and Commonwealth Court reversed and remanded with instructions to dismiss the appeal. Neither the easement nor the Agricultural Area Security Law provided for third-party enforcement of the easement. Furthermore, the Local Agency Law was not implicated because the letter did not constitute an adjudication, but rather a manifestation of the prosecutorial discretion of the Board.

"Sanctuary Cities"

City of Philadelphia v. Sessions, 2018 WL 1305789 (E.D. Pa., March 13, 2018). City challenged Attorney General's (AG) imposition of conditions related to assisting federal authorities with immigration enforcement on City's receipt of Justice Assistance Grant (JAG) funds. On AG's motion to dismiss City's six-count amended complaint, the district court held that the matter was ripe for disposition given that the Department of Justice represented in another pending action that the conditions of that grant would apply across the board to all applicants. Furthermore, AG's assertion that the grant statute requiring that the applicant certify compliance with "all other applicable federal laws" includes statute prohibiting withholding of immigration status information was a sufficiently open legal issue to preclude motion to dismiss. In its separation of powers count, City asserted that for the AG to attach conditions to a formula-based grant program was a usurpation of congressional authority, and the district court held the argument was plausible, denying the motion on that count. On the "arbitrary and capricious agency action" count the court denied the motion holding that the City plausibly stated a claim that the AG cannot adequately justify how the conditions further the purpose of the grant program. City also asserted a plausible Tenth Amendment claim, alleging that the conditions effectively commandeer City employees to perform federal functions. Additionally, City's Spending Clause and Declaratory Judgment counts survived motions to dismiss.

Statute of Limitations

In re Return of Pers. Prop., 180 A.3d 1288 (Pa. Cmwlth. 2018). The Commonwealth by and through Township appealed trial court order granting petition of Appellee filed December 2, 2016, to return personal property seized from him on August 22, 2003, by Township police department. Commonwealth Court reversed the order and dismissed the petition. Because no statute of limitations applies to a petition to return

seized personal property there is not a perpetual right of action but rather the residual six-year time limitation contained in 42 Pa. C.S. Section 5527(b).

Taxation

Bay Harbor Marina Ltd P'ship v. Erie County Bd. of Assessment Appeals, 177 A.3d 406 (Pa. Cmwlth. 2018). Authority leased two parcels to Appellants for use as private gated marinas. Lease agreements specified that lessees would be responsible for any taxes on property. lessees applied to the Board seeking tax immunity, and Authority revoked joinder to petition, notifying Board that it believed the parcels were taxable. Board had a hearing and declared the properties taxable. Appellees appealed and trial court held that lessees did not have standing to appeal tax immunity and the property was, nevertheless, taxable. In addition to several other procedural issues, Commonwealth Court held that because lessee's were responsible for taxes under lease, they had sufficient enough immediate interest to satisfy standing requirements. The Court also held that the Authority's submission of evidence regarding the use of the property was sufficient to sustain finding that the property was taxable generally, but remand was warranted to determine whether specific public access portions of the property were tax exempt/immune.

Lehigh Valley Rail Mgmt. LLC v. County of Northampton Revenue Appeals Bd., 178 A.3d 950 (Pa. Cmwlth. 2018). County appealed trial court determination that 85.01 acres of property owned by Appellee were exempt from tax authorized by Public Utility Realty Tax Act (PURTA). Commonwealth Court vacated and remanded for new findings of fact and reversed trial court determination that railroad office and parking lot were exempt from the PURTA tax on utility realty. The Court held that buildings and miscellaneous structures, and lands appurtenant thereto are not necessary to operate a railroad and are thus subject to the tax. Consequently, because the 85.01 acres contained an office trailer, a parking lot, and a driveway, remand was necessary for further determination of taxable property in accordance with the opinion. Furthermore, the Court clarified that only those "essential indispensable part[s] necessary to operate" a railroad are entitled to exemption.

In re Appeal of Springfield Hosp. Folio No. 42-00-06625-01, 179 A.3d 632 (Pa. Cmwlth. 2018). Hospital entered into a court-approved payment in lieu of taxes agreement (PILOT) with taxing authorities in 1994 providing that Hospital "shall not be subject to real estate tax on the existing hospital building so long as the existing hospital building is used solely for hospital purposes by [Hospital] or is used solely for hospital purposes by [a tax-exempt] entity. . ." On January 8, 2016, Hospital was sold to a for-profit entity, with an effective transfer date of July 1, 2016. Based on their interpretation of the PILOT, taxing authorities issued a tax bill to Hospital dated July 1, 2016. After notification from the taxing authorities, the assessment office did not update the assessment roll to reflect Hospital's nonexempt status. After appeal, the appeals board changed the status effective January 1, 2017, and the trial court granted a petition to enforce and ordered the date be changed effective July 1, 2016. Commonwealth Court affirmed. Despite the fact that the "Assessment Day Rule," requiring that property exempt on the day of assessment remains exempt for the entire year, still applies in Delaware County, the PILOT agree-

> *Third Circuit invoked the "congressional policy of forbidding federal 'direction, supervision, or control' of local police departments" in a decision affirming the dismissal of a complaint [related to] racial discrimination by law enforcement against minority citizens. . . . The Court added in a footnote that the language of what is now 34 U.S.C. § 10228 appeared "in the same section that authorizes the Attorney General to sue to prevent discrimination in the administration of federal funds." . . . This seldom-applied statute may have significant impact on this case and also warrants denial of the motion to dismiss. We cannot at this stage say that the City will be unable to prove that the Challenged Conditions violate the Tenth Amendment, particularly as they appear to impose the sort of federal "direction, supervision, or control" that 34 U.S.C. § 10228(a) forbids.*
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> - *City of Philadelphia v. Sessions*

ment subjecting Hospital to taxation upon conveyance, could be enforced. The PILOT was authorized by the General Assembly and incident to a court order. Furthermore, Hospital waived any argument that assessment law prohibited enforcement of the PILOT.

Tax Claims

Jenkins v. Fayette County Tax Claim Bureau, 176 A.3d 1038 (Pa. Cmwlth. 2018). Appeal by purchaser challenging trial court order vacating tax sale of real property. Taxpayer was honoring an unwritten installment agreement with tax claim bureau. Nevertheless, the property was listed for sale and posted. Three days before tax sale, taxpayer attempted to enter into a new agreement, but was told that the property was "already in tax sale." The trial court set aside the sale and intervening purchaser appealed. Taxpayer asserted that purchaser failed to file a timely Pennsylvania Rule of Appellate Procedure 1925(b) statement of errors complained of on appeal with the trial court. In its Rule 1925(b) opinion, the trial court concluded that his statement was late and thus all issues were waived. The trial court explained that, aside from the 1925(b) issue, its decision was consistent with the Real Estate Tax Sale Law. Commonwealth Court agreed and affirmed. Current caselaw requires a waiver of issues for failure to file a timely Rule 1925(b) statement, and, even if the statement would have been acceptable, the refusal of the Tax Claim Bureau to offer an installment plan prior to the sale or explore the amount of cash the taxpayer was willing to offer, warranted voiding of the sale.

Brown v. Chester County Tax Claim Bureau and Chester County, 178 A.3d 925 (Pa. Cmwlth. 2018). Manufactured home located on parcel owned by Appellant was subjected to upset sale for delinquent property taxes. No bids were successfully submitted, and owner of home vacated premises, leaving manufactured home on the parcel. Appellant provided notice of abandonment to the owner and taxing districts. Tax claim bureau informed Appellant that home could not be sold because it had been exposed to upset sale. Nevertheless, Appellant received money judgment from magisterial district judge and auctioned home in accordance with Manufactured Home Act. The tax claim bureau refused to certify the home free and clear of tax liens and refused to acknowledge Appellant's ownership interest. Appellant petitioned unsuccessfully for declaratory judgment from the court of common pleas and after remand on post-trial motions, appealed to Commonwealth Court. Commonwealth Court affirmed. The Court held that once proceedings under the Real Estate Tax Sale Law were instituted, no other proceedings transferring title could lawfully be initiated. Furthermore, once unsuccessful upset sale was concluded, title to the property transferred to the tax claim bureau in trust, and existing liens were not divested because no valid sale had yet occurred.

Tort Liability

Cagey v. Commonwealth, 179 A.3d 458 (Pa. 2018). Appellants suffered injury after losing control of a vehicle and colliding with a PennDOT installed guardrail which penetrated the vehicle. Appellants brought suit against the Commonwealth alleging the injuries were due to "(1) PennDOT's negligent installation of a guardrail within an area that should have been traversable by vehicle; (2) PennDOT's negligent installation of a dangerous 'boxing glove' guardrail that was not 'crashworthy'; and (3) PennDOT's negligent failure to inspect or correct the 'boxing glove' guardrail." PennDOT raised sovereign immunity, and obtained a judgment on the pleadings in its favor. Commonwealth Court affirmed, citing its opinion in Fagan v. Commonwealth, Dep't of Transp., 946 A.2d 1123 (Pa. Cmwlth. 2006), for the principle that the sovereign immunity that protects the Commonwealth from claims based on a failure to install a guardrail extend to claims based on negligent installation and/or maintenance of the guardrail. The Pennsylvania Supreme Court reversed the finding of sovereign immunity and remanded for further proceedings. The court held that a negligently installed guardrail fit squarely within the real estate exception to sovereign immunity; the guardrail becomes realty because it is affixed, the design resulted in more injury than would have occurred had it been absent, raising the allegation, at least, of a dangerous condition, and the injury would be recoverable at common law.