LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Summer 2016

Welcome to the Summer 2016 edition of the Commission's quarterly Legal Update, intended to highlight notable decisions that may have implications for Pennsylvania municipalities. This edition's references include an interesting decision on municipal tort liability, a decision affecting tax exemption, and a U.S. Supreme Court decision discussing First Amendment retaliation. Our legislative corner includes a recent enactment increasing the in-lieu-of-tax payments for Commonwealth property. Our complete compilation of Summaries of Acts Signed into Law, along with updates on Commission legislation and projects, may be found on our website. - Philip Klotz, Executive Director of the Local Government Commission

Legislative Updates:

Act 89 of 2016 amends the Pennsylvania Farmland and Forest Land Assessment Act to, among other things, prohibit the application of a land use value which is greater than the fair market value assessment that would apply to the land if it were not enrolled in "Clean and Green" (previously HB 806).

SB 1300, PN 1904 amends Title 53 of the Pennsylvania Consolidated Statutes (Municipalities Generally) to further provide for the satisfaction of residency requirements for elected office after military leave. See also HB 2186. Both bills given second consideration.

HB 1956, PN 3181 amends Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes to require public notice and meeting before the sale or lease of water or sewer system. Passed by House and referred to Senate Consumer Protection and Professional Licensure Committee.

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Civil Rights

Heffernan v. City of Paterson, N.J., 136 S.Ct. 1412 (April 26, 2016). Employee entitled to bring First Amendment retaliation claim even when the employer's actions are based on a factual mistake about the employee's behavior, provided employer considered mistaken activities are of a kind that they cannot constitutionally prohibit or punish.

Bruni v. City of Pittsburgh, 2016 WL 3083776 (3rd. Cir. June 1, 2016). Challenge to previously-upheld City of Pittsburgh ordinance prohibiting certain speech within 15 feet of health care facilities permitted to proceed in light of *McCullen v. Coakley*, 134 S.Ct. 2518 (2014). Court held that dismissal of claims challenging ordinances like the one at issue here "will rarely, if ever, be appropriate at the pleading stage." McCullen requires that the government demonstrate that "substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," and, at this stage in the proceedings, complaint's allegation that no instances of disruption or obstruction justify the ordinance must be credited.

Long v. Armstrong County, 2016 WL 3083384 (W.D. Pa., May 31, 2016). Estate of victim brought civil rights action under "state created danger" doctrine against county. County jail administered a work release program where inmates performed activities outside of the confines of the jail, often with lighter supervision, in uniforms similar to civilian dress. Inmate escaped and murdered victim in her home adjacent to jail. After determining the danger was not to a specific segment of the population, the court held that 1. harm to the "public in general is not enough" to sustain the action, and 2. an insufficiently secured prison "creates a harm to the public in general," and, thus, a meritorious state-created danger claim cannot be sustained.

Pomicter v. Luzerne County Convention Center Authority and SMG, 2016 WL 1706165 (M.D. Pa. April 27, 2016). Private entity in contract with authority to provide management services for arena held to be a state actor. Despite occurring on "nonpublic

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"We note that a rule of law finding liability in these circumstances tracks the language of the First Amendment . . . [which] begins by focusing upon the activity of the Government. It says that 'Congress shall make no law . . . abridging the freedom of speech.' The Government acted upon a constitutionally harmful policy whether Heffernan did or did not in fact engage in political activity."

- *Heffernan v. City of Paterson, N.J.*

forum," nonintrusive nature of leafleting at arena and questionable rationale for prohibition sufficient to permit action under First Amendment and state law to proceed on merits.

Employee Relations

Wright v. Lower Salford Tp. Mun. Police Pension Fund, 36 A.3d 1085 (Pa. Cmwlth. April 1, 2016). Officer suffering knee injury in 1996 and subsequent surgeries entitled to permanent disability pension because board motion to honorably discharge officer in 2012 due to permanent disability constituted "administrative adjudication" setting the date of officer's permanent disability as occurring after ordinance amendments establishing payments.

County of Erie v. AFSME*, 2016 WL 2755914 (Pa. Cmwlth. May 12, 2016)*. Trial court order denying petition to vacate arbitration award affirmed. Sheriff denied deputy sheriff right granted by collective bargaining agreement (CBA) to bump junior officer, while authorizing another officer to do so. County asserted that Section 1620 of the County Code permitted the sheriff to move any employee into any position, regardless of the CBA. The County also argued that the sheriff has the discretion to allow one employee to bump while restricting that right for another. Commonwealth Court held that Section 1620 does not grant a sheriff "unfettered" supervision rights, and that the trial court's finding that the sheriff's exercise of "arbitrary" supervision decisions regarding bumping in violation of the CBA was not protected by the section.

Amalgamated Transit Union Local 85 v. Port Authority of Allegheny County, 2016 WL 2984223 (Pa. Cmwlth. May 24, 2016) (UNREPORTED-See 210 Pa. Code §69.414). After Authority revised absenteeism policy without Union agreement, arguably in violation of the CBA, Union filed an untimely grievance. Upon arbitration, the neutral arbitrator issued a draft opinion deciding the substantive issue of the propriety of the policy modification, *and*, alternatively, also deciding that the grievance was untimely filed. On petition by the Union, the trial court refused to vacate the arbitration award. Commonwealth Court reversed and remanded, holding that arguing the substantive issues during arbitration did not constitute waiver of the timeliness issue by the Union. Furthermore, because the CBA required that grievances be filed within 30 days of an incident, the adjudication of the merits of the matter by the panel did not derive its essence from the terms of the CBA and was, thus, prohibited. Finally, because Authority did not grieve the issue of Union's ability to appeal notwithstanding failure to sign the award, the issue was not properly before the court.

Assessment

Pocono Community Theater v. Monroe County Bd. of Assessment Appeals, 2016 WL 1579045 (Pa. Cmwlth., April 20, 2016) (UNREPORTED-See 210 Pa. Code §69.414). Theater held to qualify for purely public charity exemption from real estate taxation. Court held that government has historically undertaken a burden to promote the arts, and theater relieves government of a portion of that burden. Additional elements of test, including disposition of assets upon dissolution, and "rendering gratuitously" a substantial portion of services also satisfied.

Millcreek Tp. School Dist. v. Erie County Bd. of Assessment Appeals*, 2016 WL 3223682 (Pa. Cmwlth. June 13, 2016)*. In appeal of assessment to trial court, appraisal commissioned by property owner for previous appeal was introduced by School District as rebuttal evidence. Commonwealth Court held that the opposing party statement hearsay exception did not apply because appraiser did not "act in a representative capacity" for owner. Because the trial court relied on the previous appraisal to discredit owner's current appraisal, and was thus prejudicial, the admission of the report constituted reversible error.

Tax Claims

In re Trustees of Conneaut Lake Park, Inc., 2016 WL 2591071 (W.D. Pa. May 4, 2016). Bankruptcy court determination that taxing authorities were entitled to portion of proceeds of insurance policy taken by management company on property of debtor affirmed in part and reversed in part. Management Agreement authorized Company to operate a portion of debtor property for 20 years and retain certain profits and was required to "repair, improve, and secure building at its own expense." After fire on property, company informed by insurer that delinquent taxes of debtor/owner would be deducted from proceeds in accordance with 40 Pa. P.S. § 638. The court determined that the statute only applied to property "owners" collecting insurance proceeds, and that third parties are not responsible for the tax liability of others. Furthermore, debtor was not a named insured or otherwise entitled as a beneficiary under the policy, and not entitled to any portion of proceeds.

City of Philadelphia v. Auguste, 2016 WL 1718844 (Pa. Cmwlth. April 29, 2016). Trial court determination that sale conducted under the Municipal Claim and Tax Lien Law should be set aside because of a lack of a hearing prior to decree authorizing sale and inadequate presale notices, issues raised by the court *sua sponte*, reversed. Commonwealth Court determined that due process issues raised *sua sponte* by court below provide adequate basis for reversal, and that sole reviewable determination, sufficiency of service on owner, was satisfied by City.

> *"It may be true. . . that Theater does not provide a statutorily or constitutionally mandated governmental function. However, . . . the trial court interpreted the [rule] too narrowly. . . Theater's efforts to provide a venue for musical and theatrical performances, as well as community events and art programs, furthers the government's assumed responsibility to support the arts while advancing historic preservation. Screening films, whether first-run or 'art' films, is a cultural activity, which is why museums of every type also screen films."*
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> - *Pocono Community Theater v. Monroe County Bd. of Assessment Appeals*

Land Use

Township of Salem v. Miller Penn Development, LLC, 2016 WL 3023809 (Pa. Cmwlth. May 26, 2016). Commonwealth Court affirmed judgment in favor of Township. In 2000, Township approved subdivision calling for the construction of a street. Township required no security. In 2001, Township entered into agreement with developer to complete street or post bond. In 2010, Township filed action against developer for the yet-uncompleted street. The Court held that the doctrine of *nullum tempus occurrit regi* precludes the application of a statute of limitations on actions by municipalities acting in a governmental capacity and seeking to enforce obligations imposed by law to enforce contracts securing public rights, even if the municipality is not required to enter into the contract. Furthermore, equitable relief in the form of court-ordered bonding is not available because damages are an adequate remedy and capable of ascertainment.

Nextel Communications of the Mid-Atlantic, Inc. v. Zoning Hearing Bd. of Ross Township, Monroe County, PA, 2016 WL 1271385 (March 31, 2016). Summary judgment in favor of Board granted in action challenging adverse zoning decision under Telecommunications Act of 1996 where Board determined applicant did not make good faith effort in determining whether proposed tower is least intrusive means of filling service gap. Applicant drove in a one mile radius from the proposed site and found that there were no suitable alternative locations within that area, did not consult the FCC to determine if other cellular carriers have erected antennas in the area, and did not contact any other companies to determine if there was a tower near the subject area to possibly co-locate an antenna.

Tort Claims

Balentine v. Chester Water Authority, 2016 WL 3125698 (Pa. Cmwlth. June 3, 2016). Estate of accident victim brought claim against Authority. Estate alleged that Authority "negligently parked" truck such that it was struck by another driver, forcing it into victim. In

a matter of first impression, Commonwealth Court affirmed summary judgment in favor of Authority. Although the CWA's truck was running and had its strobe light on, there was no allegation that the truck was not fully parked at the time, that the injury was caused by the voluntary movement of the truck's parts or an attachment to the truck, or that there was any negligent maintenance or repair to the truck. Consequently, the truck was "no longer in operation" when the accident occurred, and the incident was not subject to an exception to municipal tort immunity.

Emergency Services

In Re Reliance Hose Co. No. 2 of Glassport, 2016 WL 2841106 (Pa. Cmwlth., May 13, 2016) (UNREPORTED - See 210 Pa. Code §69.414). In Orphans Court proceedings related to dissolution of volunteer fire company, other company (Citizen's) servicing municipality objected to disposition of proceeds to Salvation Army, police department, and relief association, and filed a notice of appeal asserting that the disposition violated the doctrine of *cy pres*, and that it was entitled to the proceeds. Citizen's counsel was present for proceedings and did not file petition to intervene. Without being granted party status, and without interest other than that of the general public represented by Attorney General, Citizen's appeal quashed.

Eminent Domain

In re Com., Dept. of Transp., 2016 WL 2586144 (Pa. Cmwlth. May 5, 2016). Trial court affirmed. PennDOT acquired right of way, an aerial easement and a temporary construction easement for purposes of widening a highway access ramp. Owner litigated issue of just compensation and parties settled with stipulation as to all future claims. Years later, owner attempted to reopen case after discovering third-party damage to property. The trial court denied the petition, determining that the Eminent Domain Code offered no remedy because the claim involved negligence and injuries of a temporary nature, sounding in trespass. Commonwealth Court agreed that because damages were directly caused by party without power of eminent domain and not of a type recoverable under the act, trespass was the appropriate action. Furthermore, the Code provided no mechanism for the reopening of a settled or discontinued case, and grounds did not exist for setting aside discontinuation.

Municipal Fees

Ziegler v. City of Reading, 2016 WL 1579042 (Pa. Cmwlth. April 20, 2016)(UNREPORTED - See 210 Pa. Code §69.414). Trial court decision declaring residential curbside recycling fee of home rule city authorized and not in violation of the Municipal Waste Planning, Recycling, and Waste Reduction Act (Act 101 of 1988) reversed and remanded. Although a home rule city may exercise powers granted to non-home rule cities after enactment of charter, further analysis needed to determine whether fee negatively impacted stated goals of Act 101, including program self-sufficiency.

Nernberg v. Borough of Sharpsburg, 2016 WL 3521970 (W.D. Pa. June 28, 2016). Defendant Borough's motion for summary judgment denied. Rental property license ordinance required owners to pay biannual licensing fee and comply with inspection requirements. Owners filed action challenging licensing fee as "disguised tax." In light most favorable to owners, Borough revenue of $55,980.00 over expenditures of $26,369.50 could be seen by a reasonable jury as excessive. Furthermore, despite removal of occupancy restriction from ordinance, housing and human relations actions for damages were not moot.

Legislative Updates:

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Act 85 of 2016 amends the Fiscal Code, in part, to increase from $1.20 per acre to $ 2.00 per acre the reimbursement to each county, each school district and each township for tax-exempt land owned by the Department of Conservation and Natural Resources, effective July 1, 2017 (previously HB 1605).

SB 289, PN 173 amends the act of April 8, 1949 (P.L.418, No.58) by further providing for public funding of private lateral sewer lines. Senate Bill 289 passed by Senate and referred to the House Environmental Resources and Energy Committee.