



LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Summer 2017

Best Summer wishes from the Commission offices in Harrisburg. This edition of the Commission's Legal Update is loaded with momentous decisions, including a United States Supreme Court opinion addressing the test for regulatory takings, and several Pennsylvania Supreme Court cases establishing significant precedent in municipal law.

- Philip Klotz, Executive Director of the Local Government Commission

Legislative Updates:

HB 1346, PN 2167. Amends Titles 18 (Crimes and Offenses) and 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes (Pa.C.S.) by prohibiting unlawful use of an unmanned aircraft (drone) and preempting municipal enactments regulating ownership or operation of a drone. HB 1346 passed by House and referred to Senate Judiciary Committee.

SBs 801-803, PNs 1012-1041. Amend Titles 8 (Boroughs and Incorporated Towns) and 11 (Cities) of Pa.C.S., First Class Township Code and Second Class Township Code, respectively, to permit purchases of used equipment, vehicles and other personal property from volunteer emergency service organizations without competitive bidding, thus allowing the local governing body and the volunteer emergency service organization to agree on a fair purchase price without soliciting other suppliers. SBs 801-803 were referred to the Senate Local Government Committee. See also: HBs 1609-1611.

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Civil Rights

Mirabella v. Villard, 853 F.3d 641 (3d Cir., April 4, 2017). After petitioning their local government for assistance in a dispute with their neighbors and, at the same time, threatening the local government with litigation, appellees were instructed via email, to refrain from communicating directly with any members of the local government other than its counsel. Local officials also threatened to move for sanctions against appellees for frivolous litigation if they filed suit. In a §1983 claim alleging First Amendment violations, the Third Circuit held that email barring appellees from communicating with government for any purpose constituted First Amendment retaliation and an over-broad infringement on the right to petition government. With regard to threat of sanctions involving a public official's own speech, it was not sufficient to constitute retaliation. Because neither right in this matter was "clearly established" by existing on-point precedent, qualified immunity applied.

Northeastern Pa. Freethought Soc'y v. County of Lackawanna Transit Sys., 2017 WL 1316206 (M.D. Pa., April 10, 2017). Plaintiff alleged that System's policies regarding advertisements on its buses and its refusal to

run ads containing the word "Atheist" violated plaintiff's right to freedom of speech under the First and Fourteenth Amendments. Despite history of occasionally permitting ads on potentially controversial subjects, subsequent enactments of policies indicated "strict controls over the types of ads" in a manner "consistent with its goals of excluding ads that would lead to debates and arguments on its buses and, of transporting its riders safely to their destinations," and supported determination that System advertising space was a nonpublic forum. Summary judgment inappropriate and fact-finding required on issues of reasonableness and viewpoint neutrality.

Reilly v. City of Harrisburg, 858 F.3d 173 (3d Cir., May 25, 2017). Protesters brought action against city challenging constitutionality of ordinance that restricted right to protest in the vicinity of abortion clinics. District court permitted claims to proceed to discovery, but denied preliminary injunctive relief after determining that they did not meet burden of establishing that they were likely to succeed on merits. Third Circuit restricted review to propriety of denial of preliminary injunction. Although plaintiffs normally have the burden of demonstrating a sufficient likelihood of prevailing on merits in

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determining propriety of a preliminary injunction in First Amendment cases, plaintiffs must be deemed likely to prevail unless government establishes that plaintiffs' less restrictive alternatives are less effective. Because burden was not shifted to government in this matter, order was vacated and matter remanded.

Eminent Domain

Szabo v. Commonwealth, 159 A.3d 604 (Pa. Cmwlth., April 12, 2017). Department of Transportation filed a Declaration of Taking with trial court to acquire property of appellants. Almost a year later, appellants filed a petition for a board of view to determine just compensation. Prior to hearing, a survey revealed that plans attached to Declaration misidentified property owned by appellants as owned by others. As a result of inaccuracies, plans understated the amount of property owned by appellants taken as part of condemnation. Appellants filed petition with trial court for an evidentiary hearing, which was denied. On appeal, Commonwealth Court reversed and remanded, holding that 30 day limitation on objections to declaration does not preclude later, proper establishment of extent and effect of taking where declaration inaccurately describes scope of condemnation.

Murr v. Wisconsin, 137 S.Ct. 1933 (June 23, 2017). Petitioners prohibited from conveying riverside lot (E) for development because of minimum lot size regulations that had effectively merged it with adjoining lot (F) they owned, brought action claiming a regulatory taking of value of (E). In adjudicating the central question of whether a tak-

ings analysis should apply solely to (E) or to (E) and (F) together, Supreme Court established a multi-pronged test to determine the "denominator," including treatment of the property under state law, physical characteristics of the property, and value of the property under the challenged regulation. Court determined that lots should be examined together. Because petitioners were aware of merger regulations upon acquiring common ownership and combined property retained significant value, no regulatory taking occurred.

Employee Relations

Wilkins Twp. v. Wage Policy Comm. of Wilkins Twp. Police Dep't, 2017 WL 2180681 (Pa. Cmwlth., May 18, 2017). Township filed petition to vacate arbitration award, which upheld police officer's grievance challenging township's denial of officer's proposed off-duty employment, and ordered township to pay lost wages. Court of common pleas affirmed, and township appealed. Commonwealth Court determined that arbitrator did not exceed his jurisdiction by awarding lost wages, but that award violated township's procedural due process rights, and so remanded for further proceedings on issue of damages. On remand, arbitrator calculated and awarded lost wages, and township again petitioned to vacate. Court of common pleas denied petition and this appeal resulted. Commonwealth Court held that under the law of the case doctrine, the Commonwealth Court's prior ruling finally settled the issues of arbitrator's authority to issue award that included damages for lost wages and whether township received

due process on issue of damages. Furthermore, award of lost wages did not violate township's due process rights, and arbitrator "did not exceed his authority by concluding that police officer was not required to explicitly request damages in the form of lost wages in his initial grievance."

Home Rule

Building Owners and Managers Ass'n of Pittsburgh v. City of Pittsburgh, 2017 WL 2153216 (Pa. Cmwlth., May 17, 2017) (UNREPORTED-See 210 Pa. Code §69.414) and *Pennsylvania Rest. and Lodging Ass'n v. City of Pittsburgh*, 2017 WL 2153813 (Pa. Cmwlth., May 17, 2017) (UNREPORTED-See 210 Pa. Code §69.414). City ordinances, one requiring "Security Officers" and "Building Service Employees" who work in specified buildings to receive training by a school certified by city's Fire Bureau to identify, prevent and respond to emergency situations, and another providing that employers must provide a specified amount of sick time, were held to exceed power of home rule municipality to regulate business in violation of 53 Pa.C.S. §2962(f). Furthermore, no express provisions of either Second Class City Code or other statutes could be relied upon for providing authorization.

City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1, 161 A.3d 160 (Pa., May 22, 2017). City and bargaining unit met to bargain issue of residency for officers after legislature passed law abrogating mandatory residency requirements and authorizing city to require officers to become residents

as a condition of employment ([Act 195 of 2012](#)). During negotiations, referendum amending city's home rule charter to require residency was approved. Arbitration panel issued a supplemental award replacing a city-only residence provision with a requirement that officers reside within a 25-mile radius of the city-county building. City sought review by trial court, which held that residency was within the jurisdiction of the panel as a condition of employment and that home rule charter could not supersede Act 111 of 1968. Commonwealth Court reversed. On review the Pennsylvania Supreme Court reinstated trial court order. The Supreme Court held that home rule charter could not supersede Act 111's mandate that residency be a condition of employment.

Land Use

Delchester Developers, L.P. v. Zoning Hearing Bd. of Twp of London Grove, 161 A.3d 1081 (Pa. Cmwlth., May 9, 2017). Developer appealed trial court affirmation of zoning hearing board (ZHB). A portion of the developer's appeal challenged the trial court determination that the ZHB had no jurisdiction to hear challenge to township storm water management ordinance (SWMO). Furthermore, developer argued that restrictive "net out" provision related to lot size in a groundwater protection overlay district was an unconstitutional restriction on the use of private property. Commonwealth Court held that the SWMO was not a "land use

ordinance" and consequently, must face substantive challenges first in the court of common pleas. The court also determined that because net out provisions were substantially related to a le-

"[T]he Home Rule Charter Law ... prohibits the enactment of 'any provision inconsistent with any statute heretofore enacted prior to ... 1972, affecting the rights, benefits or working conditions of any employee of a political subdivision of this Commonwealth.' Public sector collective bargaining rights are set forth in Act 111, which became effective in 1968...Accordingly, the order of the Commonwealth Court permitting a home rule municipality to redefine subjects of collective bargaining is contrary to Act 111, and therefore is reversed."

- *City of Pittsburgh vs. FOP*

itimate purpose of protecting sensitive geographic areas, no substantive due process violation had occurred. In the context of an "unconstitutional conditions" takings analysis, the net out provisions contain an essential nexus and rough proportionality to the impact of the development to preclude any violation of the Fifth Amendment.

EQT Prod. Co. v. Borough of Jefferson Hills, 2017 WL 2180678 (Pa. Cmwlth., May 18, 2017). Borough appealed from an order of trial court reversing decision of council to deny conditional use application of appellees to construct, operate and maintain a natural gas production facility. In support of its denial of the application, council primarily cited applicants' alleged failure to satisfy ordinance requirement that "[t]he use shall not en-

danger the public health, safety or welfare nor deteriorate the environment, as a result of being located on the property where it is proposed." Given that conditional use evidences a legislative decision that a proposed use is presumptively consistent with health, safety and welfare of the community, once objective criteria for use was met, burden shifted to objectors. Objectors failed to provide evidence that use of the specific site, rather than testimony of adverse effects from other sites, would be more detrimental than unconventional wells generally. Council's attempt to augment conditional use requirements with criteria based on Environmental Rights Amendment to the

[Pennsylvania Constitution \(Art. I, Sec. 27\)](#) was inappropriate given legislative determination that use was consistent with planning requirements and health, safety and welfare. Remanded for consideration of reasonable conditions.

Municipal Authorities

Southeastern Pa. Transp. Auth. v. City of Philadelphia, 159 A.3d 443 (Pa. April 26, 2017)(plurality). Between 2007 and 2009 city instituted administrative actions against authority under the City Fair Practices Ordinance (FPO), which included claims of discrimination not covered by the Pennsylvania Human Relations Act. While administrative actions were pending, authority filed civil action against the city alleging that authority was a Commonwealth entity and Pennsylvania Constitution barred city from exercising

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jurisdiction over it. In a second review after a prior remand, a divided Pennsylvania Supreme Court affirmed Commonwealth Court in holding that the statutory scheme disclosed a legislative intent to exclude authority from FPO.

Fees and Charges

In re Billings, 2017 WL 1488657 (3d Cir., April 26, 2017). Appellants failed to pay municipal fees and consequently faced a sale of their home. A few days before the sale they declared bankruptcy, which resulted in an automatic stay of the sale of their property. Municipality filed several motions with the state trial court to postpone the sale while the bankruptcy proceeding continued. At no point did the Township request relief from the automatic stay issued by Bankruptcy Court. Appellants argue that filing those continuance motions was incompatible with the automatic stay. The Third Circuit disagreed, holding that the continuances did not violate Bankruptcy Code, and that even if legal fees related to the continuances were passed along to appellants the status quo was not disrupted.

Municipal Property

In re Borough of Downingtown, 161 A.3d 844 (Pa., June 20, 2017). Pennsylvania Supreme Court reviewed protracted litigation involving the fate of Kardon Park. At issue was applicability of the Donated and Dedicated Property Act's (DDPA) requirement for judicial approval of conveyance of the park for commercial development. Court remanded the question as applied to those portions of the park acquired by emi-

nent domain, noting that acquisition predated the current Eminent Domain Code, and applicability of current law must be argued. Court resolved the question with regard to those portions of the property acquired through "Project 70 Act" monies by holding that borough must acquire both the approval of General Assembly and court under DDPA. Finally, easements granted to developers for private purposes were subject to court approval under DDPA.

Open Records

Capinski v. Upper Pottsgrove Twp., 2017 WL 2570768 (Pa. Cmwlth., June 14, 2017). Appeal from an order of court of common pleas denying appellants petition to compel compliance with two final determinations of the Office of Open Records directing township to produce public records requested. No direct appeals were taken from original final determinations. Trial court denied the petition because it concluded that township had provided all responsive public records in its possession and control. Township also argued that trial court lacked jurisdiction to entertain appellant's petition. Commonwealth Court held that Right-to-Know Law contained no express procedure to enforce final determinations, but relief in such cases would be by a petition for a writ of mandamus to the court of common pleas within six-months of the duty to act. Consequently, although appellant's petition failed on merits, it was held to be procedurally appropriate.

Pennsylvania State Police v. Grove, 161 A.3d 877 (Pa., June 20, 2017). Pennsylvania Supreme Court granted discre-

tionary review to consider whether video components of motor vehicle recordings (MVRs) created by appellant Pennsylvania State Police (PSP) are exempt from disclosure to public as criminal investigative records under the Right-to-Know Law (RTKL) or the Criminal History Record Information Act (CHRIA), and whether recordings implicate provisions of the Wiretapping and Electronic Surveillance Act (Wiretap Act). Court held that MVRs are not exempt from release generally under RTKL, and whether they contain "investigative information" shielded from disclosure under both RTKL and CHRIA must be determined on a case-by-case basis. Redaction of audio information from MVRs does not create a "new record" in violation of RTKL. Court also held that the Wiretap Act did not prohibit disclosure of audio portions of MVR in this case because none of the captured audio constituted "oral communications" since they were not conducted with a justifiable expectation of privacy. (*But see Act 22 of 2017*).

Taxation

Upper Moreland Twp. v. 7 Eleven, Inc., 160 A.3d 921 (Pa. Cmwlth., April 13, 2017). Township appealed trial court decision invalidating assessment of business privilege tax against corporation as violating Commerce Clause. Township taxed 100% of "7-Eleven Charges" (a fee paid by franchisees for services provided by the corporation) because Township included a regional office managing all stores in Pennsylvania and New England (Northeast Division). Corporation provided evidence that 7-Eleven charges were generated

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“The public policy concern regarding misfeasance by property owners applies nearly as forcefully to lessees or others who have insured property they don’t own.”

- *In re Conneaut Lake*

by interstate commerce and asserted that township failed to apportion receipts rendering tax externally inconsistent and thus unconstitutional. Commonwealth Court, however, remanded, indicating that Township may constitutionally tax 7-Eleven Charges from the Northeast Division, provided the taxed receipts are validly apportioned, and such taxes remain unpaid. Consequently, it was an abuse of discretion for trial court to invalidate the assessment outright instead of remanding the matter for recalculation.

Williams v. City of Philadelphia, 2017 WL 2562646 (Pa. Cmwlth., June 14, 2017). Objectors appealed orders of trial court sustaining City’s preliminary objections and dismissing complaint challenging validity of Philadelphia Beverage Tax (PBT), and denying Objectors’ petition for a special injunction. Commonwealth Court affirmed, holding that the subject matter of the tax, “non-retail distribution of sugar-sweetened beverages for sale at retail” does not duplicate a sales tax. Furthermore, PBT is not subject to refund if beverage is ultimately not sold at retail, and, because retail sales are not the taxable transaction, tax is not preempted by the Food Stamp Act. Court also held that the tax does not violate Uniformity Clause of Pennsylvania Constitution.

Tax Claims

In re Trustees of Conneaut Lake Park, Inc., 855 F.3d 519 (3d Cir., May 2, 2017). District court reversed. Bankruptcy court determined that taxing authorities were entitled to portion of proceeds of insurance policy taken by management company on property of debtor. 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 was informed by insurer that delinquent taxes of debtor/owner would be deducted from proceeds in accordance with 40 P.S. § 638, notwithstanding the fact that the property was not owned by the company. The Third Circuit agreed. Furthermore, it held that no taking of property occurred because the statute precluded company’s property interest in disputed insurance proceeds.

Tort Claims

Metropolitan Edison Co. v. City of Reading, 2017 WL 2655101 (Pa., June 20, 2017). City excavation of access to sewer facilities damaged company’s conduit bank after being warned that reinforcement was necessary. Company brought suit alleging that the city was liable under the utility service facilities exception to the tort immunity the city enjoyed under the Political Subdivision Tort Claims Act, 42 Pa. C.S. §8542(b)(5). Commonwealth Court reversed the trial court by holding that the damages were not caused by the utility facilities themselves, but by the

negligent excavation by city employees. Supreme Court reversed, determining that the city was liable because “the originating cause of the dangerous condition, whether by the negligence of the local agency or otherwise, is irrelevant to a proper application of the Utility Exception. Instead, the negligent act necessary to trigger the Utility Exception is the failure of a local agency to remediate a dangerous condition of which it has notice.” Abrogating *Miller v. Com., Dept. of Transp.*, 690 A.2d 818 (Pa. Cmwlth., 1997) and *DeTurk v. South Lebanon Tp.*, 542 A.2d 213 (Pa. Cmwlth., 1988).

Legislative Updates:

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HB 653, PN 692. Amends Title 68 (Real and Personal Property) of Pa.C.S. by adding a new Chapter 23 “Real Estate Foreclosure,” providing for an accelerated procedure to certify property as vacant and abandoned. HB 653 passed by House and given second consideration by Senate.

SB 690, PN 848. Amends the Home Rule Charter and Optional Plans Law in Title 53 of Pa.C.S. to establish a statutory mechanism for the initial or subsequent apportionment of any home rule or optional plan municipality without a mayor that will be dividing into wards either partially or totally. SB 690 passed the Senate and was referred to the House Local Government Committee. See also: House Bill 1362.

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