



LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Winter 2017

Welcome to the Commission's Winter 2017 Legal Update. During October through December 2016, Pennsylvania federal and state courts have handed down some memorable cases related to municipal law, including a decision from the Third Circuit refining First Amendment retaliation, an important Pennsylvania Supreme Court decision on the scope of the Right-to-Know-Law, and an interesting case regarding the validity of an ordinance for being based solely on aesthetic considerations. Keep an eye out for our Spring edition with new cases as well as updates on municipal law bills being considered by the General Assembly.

- Philip Klotz, Executive Director of the Local Government Commission

Legislative Updates:

SB 10, PN 295 amends Titles 42 (Judiciary and Judicial Procedure) and 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes to bar a local government from adopting policies that prohibit the enforcement of federal or state laws pertaining to immigrants or immigration. The bill imposes liability on a "municipality of refuge" and precludes such from receiving state grants. SB 10 was passed by the Senate and referred to the House Judiciary Committee.

SR 6, PN 160 is a concurrent resolution establishing a special legislative commission to recommend improvements to the delivery of municipal emergency services in this Commonwealth. SR 6 was adopted by the Senate and referred to the House Veterans Affairs and Emergency Preparedness Committee.

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Assessment

Kimberton Fire Co. v. Chester Corr. Care Inc. v. Borough Of County Bd. of Assessment Appeals and Phoenixville Area Sch. Dist., 2016 WL 6901348 (Pa. Cmwlth., Nov. 23, 2016) (UNREPORTED-See 210 Pa. Code §69.414). Commonwealth Court affirmed trial court order that appellant nonprofit fire company property was not exempt from real estate taxation. Buildings owned but not used or occupied by appellant, but instead by subsidiary nonprofit daycare were taxable, notwithstanding proceeds of daycare operation being used solely to fund fire company.

Maula v. Northampton County Div. of Assessment, 149 A.3d 442 (Pa. Cmwlth., Nov. 7, 2016). Commonwealth Court affirmed trial court decision to reverse appeal board imposition of rollback taxes pursuant to the Pennsylvania Farmland and Forest Land Assessment Act of 1974 (Clean and Green). Tax sale of a parcel enrolled in Clean and Green is not a "split off" triggering rollback taxes on remaining contiguous parcels.

Civil Rights

Moosic, et al, 841 F.3d 170 (3rd Cir., Oct. 24, 2016). In First Amendment retaliation action against borough council president for urging county officials to terminate contract with plaintiff as a result of dispute with borough, summary judgment in favor of official on the basis of qualified immunity warranted. Applicable precedent and related cases from other circuits found no liability for retaliation absent coercion of third party to take action against speaker. Consequently, government official was without "clear guidance" of when his own speech constitutes unconstitutional retaliation.

Goodfellas, Inc. v. Dunkel, 2016 WL 6599977 (M.D. Pa., Nov. 08, 2016). Defendants' 12(b)(6) motion on 42 U.S.C. §1983 action alleging borough and officials undertook various unconstitutional actions to undermine competitor of bar affiliated with president of council, denied in part. Selective enforcement equal protection claim permitted to proceed against borough and governing body members in official capacity notwithstanding failure to assert

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“Our General Assembly evidently did not intend to enact such a broad proscription, and we know better than to infer one in the face of more restrictive language. Based upon the plain language ... we hold that, to prove “pecuniary benefit” ... the prosecution must show some private financial gain.”

- *Commonwealth v. Veon*

membership in a protected class. Fourth Amendment malicious prosecution claim dismissed because issuance of repeated citations did not result in a deprivation of liberty interest. Fourth Amendment unlawful seizure of property claim permitted to proceed against mayor in personal capacity. Plaintiff's substantive due process claim dismissed, without prejudice, because selective enforcement was a nonlegislative act that was not alleged to have affected a “real property ownership” fundamental right. Failure to intervene claim dismissed as inappropriate outside of Eighth Amendment excessive force cases. State law conversion and malicious prosecution claims permitted.

Eminent Domain

Alpha Fin. Mortgage, Inc. v. Redev. Auth. of Fayette County, 2016 WL 7405777 (Pa. Cmwlth., Dec. 22, 2016). Enactment of the consolidated Eminent Domain Code and Section 5527(a) of the Judicial Code providing for a six-year statute of limitations on filing of a petition for appointment of viewers after a declaration of taking has been filed did not impliedly repeal Section 19.2 of the Urban Redevelopment law,

providing for a one-year limitation on challenges to just compensation or other damages in condemnations of redevelopment authority.

In Re Petition for Appointment of Bd. of Viewers, 149 A.3d 911 (Pa. Cmwlth., Nov. 15, 2016). Appellant Conservancy appealed trial court order sustaining preliminary objections of township in action to appoint a board of view to vacate road running through property or, alternatively, compensate Conservancy for unlawful taking. Commonwealth Court affirmed the trial court, holding that the “unenclosed woodland” prohibition on prescriptive easements cannot be raised for the first time on appeal. Furthermore, prohibition does not apply where a public road is alleged to exist. Testimony regarding maps and condition of pipes on road, police patrols, winter maintenance, and consistent use were sufficient to prove prescriptive easement.

Employee Relations

Carroll v. Delaware River Port Auth., 2016 WL 7187320 (3rd Cir., Dec. 12, 2016). Plaintiff in failure to promote discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. §4301 et seq.) need not plead or prove that they were objectively qualified for the position, only that military membership was a “substantial or motivating factor” in the adverse employment action. Once the initial burden is satisfied, the employer may then respond with evidence indicating a valid reason for the action, including evidence regarding qualifications.

Zampogna v. Law Enforcement Health Benefits, Inc., 2016 WL 6873038 (Pa., Nov. 22, 2016). Commonwealth Court reversed. Nonprofit administrator of retiree benefit fund is not prohibited by the Nonprofit Corporation Law from endorsing a candidate in a union election. Because union has a direct impact on the corporation's ability to “function effectively,” endorsement is not unrelated to corporate purpose. Funds paid to corporation lost their public character once paid to corporation pursuant to contract.

Enforcement / Citations

Anthony M. Rufo and TR Getz, LP v. Bd. of License and Inspection Review and City of Philadelphia Appeal of: The City of Philadelphia, 2016 WL 7421335 (Pa. Cmwlth. Dec. 22, 2016). Commonwealth Court affirmed trial court reversal of citation for violation of ordinance requiring that vacant buildings be secured with operable windows and doors, rather than boards or masonry. Because exercise of municipal police power must bear a “real and substantial” relationship to health, safety, and general welfare goals, it cannot be based purely on aesthetic considerations. Vague testimony regarding use of boards or masonry contributing to blight and that City would accept boards and masonry to secure premises as long as it was behind windows or doors supported finding that ordinance requirement was based solely on aesthetics.

Firearm Owners Against Crime, et al. v. Lower Merion Twp., 2016 WL 7321755 (Pa. Cmwlth., Dec. 16, 2016). Denial of request for preliminary in-

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junction reversed. Township ordinance regulating carrying or discharging firearms without a permit in township parks was preempted by Uniform Firearms Act. Violation of statute constituted immediate and irreparable harm warranting injunction.

Twp. of Concord v. Aiello, 2016 WL 7048051 (Pa. Cmwlth., Dec. 05, 2016) (UNREPORTED-See 210 Pa. Code §69.414). Cotenant entitled to notice of sheriff sale of property following judgment in favor of township for nuisance remediation. Such notice is required notwithstanding the fact that the property could be sold without consent of a cotenant and without any partition of the property prior to sale.

Commonwealth of Pennsylvania v. Comensky, 2016 WL 6407292 (Pa. Cmwlth., Oct. 31, 2016). Appellant challenged conviction for violation of city property maintenance ordinance. Notwithstanding a failure of the code officer to sign the private criminal complaint, conviction was valid because defects in complaint did not prejudice defendant. Authorization in municipal code for officer to “institute the appropriate proceeding at law or in equity,” held to be sufficient delegation of authority to characterize officer as “law enforcement officer” for purposes of Pa. R. Crim. Pro. 402. Double jeopardy not implicated in separate violations of the same ordinance, or where first prosecution for a violation did not result in a final order.

Ethics Act

Commonwealth v. Veon, 150 A.3d 435 (Pa., Nov. 22, 2016). Pennsylvania Supreme Court reversed Superior Court conflict of interest conviction where public official subsidized rent for legislative offices with public funds dedicated to nonprofit organization. The Court held that “private pecuniary benefit” as used in Ethics Act was intended to mean private financial gain. Furthermore, the Court held that the Department of Community and Economic Development, the agency providing Commonwealth grant funds to the nonprofit, was not a “victim” entitled to restitution.

Land Use

United States v. Bensalem Twp., 2016 WL 6695511 (E.D. Pa., Nov. 14, 2016). Motion to dismiss action against township for violations of Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) denied. Zoning hearing board deemed not to be an indispensable party to the action because defendant township authorized to remedy statutory violation by zoning amendment or enforcement decisions. Failure to grant a use variance can be

“[N]othing in the [Right-to-Know-Law] suggests that it was ever intended to be used as a tool to procure personal information about private citizens or, in the worst sense, to be a generator of mailing lists. Public agencies are not clearinghouses of “bulk” personal information otherwise protected by constitutional privacy rights.”

- PSEA v. DCED

“substantial burden” on religious activity. Discrepancy between secular and religious use zoning requirements sufficient to allege “equal terms” RLUIPA claim. More rigorous variance procedures warranted discrimination provision claim, and zoning plan limiting religious uses to single district for which no parcels were available was sufficient to sustain “unreasonable limitation” clause claim.

SPTR, Inc. v. City of Philadelphia, 150 A.3d 160 (Pa. Cmwlth., Nov. 21, 2016). Granting of preliminary injunction permitting pop-up beer garden to continue operating pending disposition of zoning appeal upheld by Commonwealth Court. Given state permits and lack of complaints, failure to procure zoning permit prior to operation was not a public nuisance or a harm to public health and safety, as required by city ordinance. Furthermore, operation of a commercial use within a residential district is not a nuisance per se.

Balady Farms, LLC v. Paradise Township Zoning Hearing Bd. v. Paradise Twp., 148 A.3d 496 (Pa. Cmwlth., Oct. 04, 2016). Trial court order affirming zoning hearing board interpretation of ordinance reversed. Conversion of building on poultry farm in order to process livestock raised on site held to fit within ordinance definition of “agriculture,” and was consistent with state right-to-farm laws.

Municipal Authorities

Keystone Sanitary Landfill, Inc. v. Monroe County Mun. Waste Mgmt. Auth., 148 A.3d 915 (Pa. Cmwlth., Oct. 14, 2016). Commonwealth Court af-

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firmed trial court decision to sustain preliminary objection of authority and to transfer action to Monroe County. Language in Municipal Authorities Act authorizing authorities to “complain and defend in all courts” held not to expand venue directed by rule requiring contract action against political subdivision to be brought in county where the political subdivision is located. See Pa. R.C.P. No. 2103(b).

Open Records

Pennsylvania State Educ. Ass’n v. Commonwealth, Dep’t of Cmty. and Econ. Dev., 148 A.3d 142 (Pa., Oct. 18, 2016). Public school employees held to have a constitutionally protected privacy interest in home addresses that may not be violated by disclosure under the Right-to-Know-Law unless outweighed by a public interest favoring disclosure.

Mun. of Mt. Lebanon v. Gillen, 2016 WL 7176947 (Pa. Cmwlth. Dec. 9, 2016). Commonwealth Court affirmed trial court reversal of determinations of Office of Open Records ordering municipality to produce emails regarding citizen participation in deer control program. Provision governing exemption of identity of individual “who lawfully makes a donation” included supplying or loaning property to an agency or giving aid to an agency without compensation.

Stormwater Management

Lincoln Investors, L.P., v. King and King, Co-Executors of the Estate of Frank King, et al., 2016 WL 7405778 (Pa. Cmwlth., Dec. 22, 2016). Commonwealth Court affirmed trial court decision to grant summary

judgment in favor of defendants. Appellant alleged that defendants were liable under Storm Water Management Act for flooding damage caused prior to adoption of a county watershed stormwater plan. Claim for damages under Storm Water Management Act requires a showing that watershed storm water plan has been violated.

Tax Sales

In re Balaji Investments, LLC, 148 A.3d 507 (Pa. Cmwlth., Oct. 06, 2016). Commonwealth Court affirmed trial court determination that purchasers at upset sale under the Real Estate Tax Sale Law, as equitable owners, were liable for property taxes accruing on the property between the sale and conveyance of the deed.

City of Philadelphia v. Phan, 148 A.3d 962 (Pa. Cmwlth., Oct. 24, 2016). In action to set aside tax sale under the Municipal Claim and Tax Lien Law, Commonwealth court held that mixed commercial/residential use property occupied by someone other than the owner was sufficient continual residential use for purposes of authorizing redemption by owner. Redeeming property owner was not precluded from redemption because rental permits were not obtained for residential use, and tax sale purchaser was entitled to reimbursement from redeeming owner of necessary and reasonable repairs made to property.

Tort Claims

Krimm v. Mun. Auth. of Westmoreland County, 2016 WL 7487751 (Pa. Cmwlth., Dec. 30, 2016).

In Tort Claims Act action against authority where motorist struck an authority-owned fire hydrant and, during repairs, a ruptured water main caused water damage to appellants' property, summary judgment in favor of the authority was sustained. Negligent conduct of municipal employees is not a dangerous condition of facilities.

Legislative Updates:

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HB 99, PN 424 amends the Borough Code to permit borough council to enter into contracts or make purchases without advertising, bidding or price quotations in emergency circumstances. HB 99 was given first consideration in the House.

HR 50, PN 425 is a resolution directing the Legislative Budget and Finance Committee to conduct a comprehensive review of the fiscal impact on Commonwealth and local government agencies for compliance with the Right-to-Know Law. HR 50 was reported by the House Local Government Committee with amendment.

SB 269, PN 256 amends the Pennsylvania Construction Code Act by, among other things, making extensive modifications to the process by which the Uniform Construction Code Review and Advisory Council (Council) reviews and adopts updates to the Uniform Construction Code. SB 269 was referred to the Senate Labor and Industry Committee.

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