LOCAL GOVERNMENT COMMISSION
Quarterly Legal Update

Winter 2018

Several important and interesting cases in municipal law were handed down this winter from our appellate courts, and we have assembled some of them in this edition of the Commission's Legal Update. Of note are Pennsylvania Supreme Court cases interpreting high public official immunity and the Right-to-Know Law as applied to district attorney records, and Commonwealth Court decisions discussing the waiver of a right to appeal in a zoning settlement agreement and the preemptive scope of the Liquor Code. Our update on municipal bills references the introduction of the Commission's comprehensive County Code revision, SB 1005, a seven-year effort in conjunction with the Pennsylvania State Association of Elected County Officials.

- Philip Klotz, Executive Director of the Local Government Commission

Legislative Updates:

SB 1005, PN 1394. Comprehensively revises the County Code and consolidates the Second Class County Code with the County Code as it relates to counties of the second class A. The revision and integration of the two codes reflect case law and current practices, standards and requirements. SB 1005 was referred to the Senate Local Government Committee.

HB 1814, PN 2469. Amends the Real Estate Tax Sale Law to provide for property ownership, maintenance and sale. Among other things, the bill clarifies that a delinquent property owner retains legal title following an unsuccessful upset sale and is therefore responsible for the property's maintenance. The bill also clarifies that the county tax claim bureau only has a limited trusteeship in order to convey the property at any sale under the act. HB 1814 was given second consideration by the House. See also SB 851.

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Blight Remediation

Francisville Neighborhood Dev. Corp. v. Estate of Moore, 174 A.3d 1193 (Pa. Cmwlth., November 27, 2017). Estate appealed order of trial court directing Estate to pay a conservator's fee of 20% of the sale price of property that was the subject of a petition under the Abandoned and Blighted Property Conservatorship Act, but for which a conservator had not yet been appointed. In October 2015, a civic organization petitioned court for appointment of a conservator under the Act, alleging several factors sufficient to warrant appointment. Estate alleged that the property was subject to a sales agreement executed February 15, 2016. At a February hearing on the petition the parties agreed to allow the sale to proceed, subject to a stipulation as to the blighted condition of the property and direction that sale funds be escrowed pending a hearing on the right of the petitioner to a conservator fee. Trial court subsequently ordered payment of a conservator fee and Estate appealed. Commonwealth Court affirmed the trial court. Because the proceedings constituted "conditional relief" under the act which entitled the petitioner to costs and a conservator fee, the court held that "[w]hether or not the conservatorship proceedings progressed to the point of the actual appointment of a specific conservator, we discern no error of law in the trial court's determination that statutory fees and costs under the Act should be awarded when the Estate elected to proceed under the Conditional Relief provision of the Act."

Civil Rights

Barna v. Board of Sch. Dir. of Panther Valley Sch. Dist., 877 F.3d 136 (3rd Cir., December 7, 2017). Appellant brought a section 1983 action against the Board and several of its officials after the Board permanently barred Appellant from attending Board meetings because of threatening and disruptive behavior. District court granted the Board's motion for summary judgment holding that although the board violated Appellant's constitutional rights, qualified immunity shielded both the Board and officials. On appeal, Third Circuit declined to directly address issue of whether the categorical permanent ban was unconstitutional, and instead addressed the issue of qualified

immunity. Noting disagreement between the circuits about the issue of bans from exercising First Amendment rights because of repeated disruptive behavior, the court held that there is no "robust consensus" on the issue and, thus, qualified immunity was appropriate for the individual officials. In terms of the Board, the court noted that municipal entities are not entitled to qualified immunity under established United States Supreme Court precedent. The court, however, reversed and remanded the issue of the Board's liability because although the Appellant forfeited the issue through neglect in appellate filings, permitting a municipal entity to enjoy immunity to which it was not legally entitled constituted "extenuating circumstances" warranting review of issue. Furthermore, Third Circuit affirmed dismissal of takings claim for want of an exhaustion of state remedies.

Kedra v. Schroeter, 876 F.3d 424 (3rd Cir., November 28, 2017). Appellant brought a section 1983 action alleging that her son, a Pennsylvania State Trooper, was subjected to a state-created danger in violation of his Fourteenth Amendment substantive due process rights when he was accidentally shot and killed by his firearms instructor. Because Appellant did not allege that the instructor had actual knowledge that there was a bullet in the gun when he fired it at decedent, District Court held that the instructor was entitled to qualified immunity and dismissed the complaint with prejudice. Qualified immunity, the court held, could only be defeated upon a clearly established theory of deliberate indifference to a substantial risk of danger, i.e., that there was a conscious, actual, subjective disregard of a risk. Third Circuit reversed and remanded. Holding that district court misapplied the appropriate standard, the court noted that "deliberate indifference" need not be established by intent to harm or knowledge that harm is certain to occur. Allegations that the instructor had significant experience, disregarded safety protocols, and knew the danger that the safety protocols were intended to prevent, were sufficient to allege deliberate indifference, and the action should proceed.

Barris v. Stroud Twp., 2017 WL 5505510 (Pa. Cmwlth., November 17, 2017) (UNREPORTED-See 210 Pa. Code § 69.414). Appellant, in a six-count complaint, challenged a Township ordinance prohibiting the discharge of firearms within the limits of the township except in specified circumstances. Trial court sustained preliminary objections of the township as to counts involving the Uniform Firearms Act, and preemption under the law referred to as the "range protection statutes." *See* 35 P.S. §§4501-4502. The court also dismissed claims under the Second Amendment to the United States Constitution and Article I, Section 21 of the Pennsylvania Constitution, holding that neither constitution "grant[s] an individual a right to discharge a firearm wherever he or she pleases," "[Appellant's] firearms have not been taken from him," and he still retained the right under the ordinance to discharge firearms for self-defense. Commonwealth Court vacated as to the constitutional claims because trial court did not undertake an analysis of what it characterized as "the gist" of the claim: whether federal or state constitutions protected the right of Appellant to practice firing his weapons on his own property. Because a more rigorous constitutional analysis was warranted by the complaint, the case was remanded.

Elections

Reuther v. Delaware County Bureau of Elections, 172 A. 3d 738 (Pa. Cmwlth., October 26, 2017). Candidate won primary as a write-in candidate for party nomination as township tax collector. The Bureau instructed her to submit her Statement of Financial Interest (SoFI) to the Bureau and the township in order to have her name appear on the general election ballot. Candidate timely filed her SoFI with the Bureau but not the township. Objectors filed a petition with trial court to have the candidate's name stricken from the general election ballot, and candidate promptly filed her SoFI with the township. Trial court held that there was no "statutory provision making [the candidate's] filing of her [SoFI] either improper or a fatal defect to her candidacy." After holding that Objector's petition was not untimely because no statutory deadline existed for the challenge of write-in candidacies, Commonwealth Court held that the name should not be stricken. Although Ethics Commission regulations require write-in candidates to file a SoFI within 30 days of having been elected or nominated, they do not make such filing a condition precedent to the candidate's name appearing on the ballot.

Employment

City of Arnold v. Wage Policy Comm. of City of Arnold Police Dep't, 171 A. 3d 744 (Pa., October 18, 2017). Widow of City police officer received 142 monthly death benefit checks based on city controller calculation. In a 2014 pension compliance audit, the Commonwealth Auditor General's Office determined that payment was calculated incorrectly and widow had been overpaid. Union initiated a grievance on behalf of the widow to dispute reduction of benefits. Upon a subsequent arbitration, the arbitrator determined that the issue was arbitrable under the collective bargaining agreement (CBA). Trial court concluded that the arbitrator had subject matter jurisdiction over the survivor pension benefits, and a Commonwealth Court panel reversed, holding that the widow's rights were not determined by the CBA, but rather an "independent right under the City's pension plan as implemented under [law and ordinance]". Supreme Court reversed, holding that the express language of law and the City's ordinances provided officers the right to arbitrate any matter "rationally related" to a term or condition of employment, including pension benefits.

City of Philadelphia v. Zampogna, 2017 WL 6598345 (Pa. Cmwlth., December 27, 2017)—City appealed trial court decision granting declaratory judgment in favor of an injured police officer, which held that the Motor Vehicle Financial Responsibility Law prohibited the City from subrogating Heart and Lung Act payments from third-party tort recovery. Commonwealth Court affirmed, holding that the 1990 amendments to the Law, *see* 75 Pa.C.S. § 1720, did not restore a public employer's ability to subrogate Heart and Lung benefits paid and a plaintiff could not claim those benefits as damages in an action against a third-party tortfeasor.

> *"PSEA III does not require a longstanding public record like the [Property Assessment Roll] to be subjected to a balancing test. Addresses contained in the [roll] are fundamentally different from the public school employees' home addresses at issue in PSEA III. In a request for a home address of a specified individual or group of individuals, the address becomes a personal identifier, and a means of disturbing an individual in his own home. . . . Although a request for a home address that is tied to an individual implicates a judicial balancing test, a request for the [roll] does not. . . . [W]e discern no individual privacy interest in nondisclosure that may be balanced against the public interest in disclosure."*
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> - *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*

Land Use

Dambman v. Board of Supervisors of Whitemarsh Twp., 171 A. 3d 969 (Pa. Cmwlth., October 6, 2017). Township residents appealed trial court order affirming board approval of land development plan. Preliminary/final plan described access road that would be used by developer to complete the project for which an easement had been granted. At a Board hearing on the plan, a letter from the zoning officer was presented indicating a zoning review of the plan was in process and it could not "be approved until all structures and/or uses for the lot(s) are located entirely within the property boundaries, or easements are established to allow [features] to be located as shown." The Board approved the final plan subject to compliance with the comments and other conditions. Residents appealed, contesting that the plan could not be approved prior to receiving necessary zoning approval. The trial court disagreed and Commonwealth Court affirmed. Unless so provided by the land development ordinance itself, the law does not require that zoning approval be obtained as a condition of receiving approval of a land development plan.

Gravel Hill Enter. v. Lower Mount Bethel Twp. Zoning Hearing Bd., 172 A. 3d 754 (Pa. Cmwlth., October 30, 2017). After Board denial of variance request, the applicant appealed decision to trial court and Township intervened. Township updated the public on progress of the action, including discussions involving a settlement. Intervenors, concerned about conditions of settlement, petitioned to intervene nine months after initiation of action. Applicant agreed to waive protest of intervention if Intervenors stipulated that they "[would not] have veto power over the settlement agreement" and that the court could "approve or reject the settlement notwithstanding the objections of the in-

tervenors." After significant modification objectionable to Intervenors, the settlement agreement was approved by the court, and included provisions applicable to parcels in other municipalities. On appeal, the Township argued that the Intervenors waived their right to appeal pursuant to the stipulation. Commonwealth Court disagreed, holding that the terms of a stipulation must be interpreted narrowly and the waiver of appellate rights must be provided for expressly in a stipulation. The court also held that there was no violation of the due process rights of the Intervenors to participate in the proceedings, but that the trial court exceeded its jurisdiction in approving those portions of the stipulation governing parcels that were not the subject of the original application.

Open Records

Miller v. County of Centre, 173 A.3d 1162 (Pa., November 22, 2017). In 2014 and 2015, several criminal defense attorneys submitted Right-to-Know Law (RTKL) requests to the County seeking correspondence between the district attorney and certain members of the county judiciary. Without notifying the district attorney or the judiciary, the County responded with information on calls and texts, including time and length as well as electronic billing information. The contents of the communications were not disclosed. The County also produced emails to the requesters without the district attorney's knowledge. The records obtained by the attorney-requesters were subsequently used in criminal cases to demonstrate improper ex parte communications between the district attorney and the judges. The district attorney filed an action requesting injunctive relief prohibiting the County from disclosing additional correspondence, claiming that the district attorney's office was a "judicial agency," and, thus, only financial records of the office are subject to disclosure in a RTKL request. Trial court agreed, granting an injunction and the Commonwealth Court reversed. Pennsylvania Supreme Court affirmed, holding that the plain language of the RTKL, the Judicial Code, and the Rules of Judicial Administration provide that district attorneys "(like public defenders, sheriffs, and others identified as "system and related personnel")" are not "judicial agencies."

Butler Area Sch. Dist. v. Pennsylvanians for Union Reform, 172 A.3d 1173 (Pa. Cmwlth., November 2, 2017). Requester was denied access to superintendent's home address and an unredacted list of all property in the school district, which was comprised of the assessment roll of subjects of real estate taxation prepared by the county. The Office of Open Records (OOR) upheld the school district's denial of addresses of public school employees and directed the school district to redact public school employees' home addresses from the property list. Trial court vacated OOR's redaction order, and permitted the school district to withhold the entire property list. Commonwealth Court reversed and ordered disclosure of an unredacted property list. Assessment rolls have long been public records, and because they show ownership rather than residency, they are not "inherently" a personal record. Consequently, the Pennsylvania Supreme Court's balancing of privacy interest against an interest in disclosing information when considering disclosure of a record of "personal nature" does not apply to the assessment rolls. *See* Pennsylvania State Educ. Ass'n v. Commonwealth, Dep't of Cmty. and Econ. Dev., 148 A. 3d 142 (Pa. 2016) ("PSEA III").

Drack v. Tanner, 172 A. 3d 114 (Pa. Cmwlth., October 12, 2017). Appellant requested all relevant documents related to the acquisition and calibration of speed timing devices in the township's possession and requested that the township procure and produce all relevant documents from the device vendors. The Office of Open Records (OOR) dismissed an administrative appeal as moot as to township records because of evidence of compliance, and ordered that the township obtain any relevant documents from vendors. Two years later, the Appellant filed mandamus action in trial court. The township filed preliminary objections in the nature of a demurrer and failure to join indispensable parties, appending emails from vendor indicating that they had no responsive documents. Trial court sustained the objections and Commonwealth Court reversed and remanded. Commonwealth Court held that a demurrer cannot exist based on facts not contained in a pleading, and trial court inappropriately sustained objection based on failure to join because relief was not requested of vendors, but of the township in accordance with OOR order. Also, because it is impossible to determine on the pleadings alone whether the

The practical impact of upholding the Ordinance and permitting the City to deny renewal of Licensee's [Business and Mercantile] License possibly, and most likely, based on the same incidents the PLCB considered to be insufficient to deny renewal of the Licensee's liquor license, demonstrates the Ordinance's meddlesome intrusion into the highly-regulated area of liquor distribution and sales. Section 611 of the Liquor Code explicitly permits municipalities to seek the closure of nuisance liquor licensed premises. . . .We do not believe the General Assembly intended to permit a municipality to achieve that result through other means.

- *1400 N. Third St. Enter. v. City of Harrisburg*

township attempted to comply with OOR order, dismissal of request for awards and costs due to "bad faith" was premature.

Police Powers

1400 North Third Street Enter. v. City of Harrisburg License and Tax Appeal Bd., 175 A.3d 450 (Pa. Cmwlth., November 29, 2017). City appealed trial court order vacating the decision of the License and Tax Appeal Board upholding the City's nonrenewal of business and mercantile license. Basis of the City's decision was a violation of an ordinance that permitted revocation where it was demonstrated that repeated illegal activities were permitted to occur on the premises. Trial court held that the Liquor Code preempted closing a business subject to a license under the Code, and that it permitted municipalities to seek closure of a facility through its nuisance provisions. Commonwealth Court affirmed, holding that although "the Liquor Code cannot preempt liquor-neutral health and welfare related ordinances, such as health and fire codes," its pervasive nature preempts enforcement of nuisance-type regulation of the day-to-day operations of licensed facilities.

Public Officials

Doe v. Franklin County, 174 A.3d 593 (Pa., November 22, 2017). Appellees applied for a license to carry a firearm through county sheriff's department. Appellees alleged they received notification of the action on their applications from appellants via postcards sent through the United States Postal Service, and the postcards were not sealed in an envelope. Subsequently, appellees filed a class action complaint against the County, the sheriff's office, and the sheriff individually, claiming, *inter alia*, violations of the confidentiality provision of the Pennsylvania Uniform Firearms Act (UFA), 18 Pa.C.S. § 6111(i). Trial court dismissed the entire complaint. On appeal, Commonwealth Court reversed in part and remanded, holding that the sheriff in his individual capacity was not entitled to high public official immunity despite the fact that the action arose from his official duties. The court interpreted 6111(i) as abrogating immunity for the sheriff because the subsection granted a cause of action against any "local government agency," including, in its view, the sheriff, that violated the confidentiality provisions. Pennsylvania Supreme Court reversed. Because common law high public immunity has not been generally abrogated in Pennsylvania, waiver of such must be expressly provided in statute. Furthermore, the construction of the UFA lead the court to conclude that the sheriff was not a "person" or a "local government agency" for purposes of the privacy violation provision, and the provision did not mention the sheriff specifically.

Taxation

S & H Transp., Inc. v. City of York, 2017 WL 4413137 (Pa. Cmwlth., October 5, 2017). Plaintiff, providing freight brokerage services whereby entire cost of transporting goods, plus its commission, is passed through to the purchaser, contested the imposition of City business gross receipts tax on portions of pass-through receipts characterized as "delivery charges." Commonwealth court held that, notwithstanding any argument of fairness, advanced delivery charge exemption provision of the Local Tax Enabling Act, Act 511 of 1965, only applied to delivery charges advanced by "a seller," and plaintiff was not a "freight carrier" for purposes of the law or related City regulations.

Legislative Updates:

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HB 1364, PN 2017. Amends Act 78 of 1979 to authorize political subdivisions and authorities to enter into contracts for "services," as defined, when two consecutive advertisements fail to induce bids. Bill was passed by House and was given first consideration by Senate.