LOCAL GOVERNMENT COMMISSION
Quarterly Legal Update

Issue 1, 2024

Legislative Updates:

In the previous Legal Update, we referenced several bills related to Local Government. There was significant movement on some of those bills as the first half of the 2023-2024 session came to a close:

- **SB 202** is now Act 4 of 2023
- **HB 1062** and **HB 1216** both passed the House and are in the Senate Local Government Committee.
- **HB 1232** and **HB 1234** both passed the House and are now awaiting 3rd consideration in the Senate. The companion Senate pieces (**SB 765** and **SB 774**, respectively) both passed the Senate unanimously.
- **SB 749** also passed the Senate unanimously.

In addition, **SB 945** (*see also* **HB 1762**) passed the Senate unanimously. These bills, sponsored by the Local Government Commission, would place the County Code into Title 16 of PA Consolidated Statutes.

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Civil Rights

Mack v. Yost, 63 F. 4th 211 (3d Cir., March 21, 2023). Chuck Mack, a former federal inmate and a devout Muslim, brought suit to guarantee of the free exercise of religion clause of the First Amendment to the United States Constitution. After being fired from the prison commissary, Mack filed suit on the basis that his firing was pretext for retaliation for expressions of his faith.

The issues pertained to a First Amendment retaliation claim against the Guards based on qualified immunity relating to the Religious Freedom Restoration Act (RFRA). After a complex procedural history, the District Court granted summary judgment to the Guards based on qualified immunity as to the RFRA claim.

On appeal, the Third Circuit held in a case of first impression that qualified immunity is a defense available to an official sued under RFRA. The court found that qualified immunity "represent[ed] the norm" when it came to suits against public officials, but the presumption is not absolute. The court recognized that RFRA was enacted to guarantee more generous protections for religious freedom than are available under the United States Supreme Court's present interpretation of the First Amendment and determined that "[t]here is no reason to believe that the robust safeguards RFRA put in place to defend religious freedom effected a departure from the existing practice of allowing officers to invoke qualified immunity."

Here, however, the Court of Appeals holds that the district court erred in applying qualified immunity at this juncture and as a matter of summary judgment. Finding that Mack could establish a prima facie case for retaliation under the RFRA, and that there was a clearly established "right to pray free of substantial, deliberate, repeated, and unjustified disruption by prison officials," the guards may raise qualified immunity as a defense, but only in the context of a full airing of the facts at trial on remand.

Froetschel v. City of Pittsburgh Historic Rev. Comm'n, 297 A.3d 449 (Pa. Cmwlth., April 14, 2023).** Appellants appeal *pro se* from the trial court which affirmed, in part, and reversed, in part, the decision of the Pittsburgh (City) Historic Review Commission (Commission).

At the hearing before the Commission, the public had the opportunity to comment. During comment, a witness (Witness) testified, objecting to many of Appellants' proposed modifications. A Commission member noted on the record that the Witness had emailed comments to the Commission ahead of time. Appellants did not request the opportunity to examine the Witness, who was the only live testimony.

The Commissioners questioned Appellants about the proposed work. During questioning, Appellants objected to the Commission's consideration of the Commission's emails from Witness because they had not been provided to Appellants. Commission overruled Appellants' objection and denied the outstanding requests for proposed improvements and modifications to their home located in a historic district of the City. The trial court took no additional evidence and concluded that a full and complete record was made before the Commission, upholding its decision. On appeal to Commonwealth Court, Appellants argued that the trial court applied an incorrect, deferential, standard of review and that the Commission proceedings deprived them of certain procedural due process rights. Finding that the Commission had not established a full and complete record, the court vacated the trial court decision and ordered further proceedings supplemented by the written correspondence received from the public and hear the homeowners appeal de novo.

However, the Commonwealth Court ultimately rejected Appellants' due process claims on the basis that Appellants never sought the opportunity to cross examine or rebut the testimony of the Witness at the Commission's proceedings. Even though the Local Agency Law guarantees the right to cross-examine witnesses, here Appellants have waived their right to do so.

Satanic Temple, Inc. v. Saucon Valley Sch. Dist., 2023 WL 3182934 (E.D. Pa., May 1, 2023). The Satanic Temple filed a lawsuit in federal court for a preliminary injunction and/or a temporary restraining order (TRO) against the Saucon Valley School District (School District) for violating the First Amendment by prohibiting the After School Satan Club (ASSC) from meeting in district facilities. School officials initially approved the club's request and explained in an email to parents that the district cannot discriminate among groups wishing to use the School District facilities. However, they reversed course due to public outcry.

Although School District previously admitted that, under the U.S. Constitution, it "cannot discriminate among groups wishing to use the [School District] facilities[,]" it ultimately rescinded approval for the ASSC citing that the group failed to make clear on a permission slip that the club is not sponsored by the district.

The court granted the TRO and allowed ASSC to meet, holding that the School District's decision to deny ASSC access to school facilities "was based on The Satanic Temple's controversial views on religion and the community's negative reactions thereto." The court ultimately determined that the claim was a pretext meant to cover up the School District's discrimination against the group's religious beliefs and it likely violated the First Amendment when it bowed to public pressure by revoking approval for the club to hold meetings at the Saucon Valley Middle School.

"When confronted with a challenge to free speech, the government's first instinct must be to forward expression rather than quash it."

- Satanic Temple, Inc. v. Saucon Valley School District

Election Law

County of Fulton v. Secretary of Commonwealth, 292 A.3d 974 (Pa., April 19, 2023). Following considerable prior litigation between Fulton County, Pennsylvania, the county board of elections, and county commissioners (collectively, County) and the Secretary of the Commonwealth (Secretary) regarding the inspection of voting machines, the Secretary's authority to limit access to its electronic voting system, and the Secretary's decertification authority generally, the Secretary appealed a ruling of the Commonwealth Court to the Pennsylvania Supreme Court, which entered a temporary order to prevent the inspection and preserve the status quo during the Supreme Court's review of the appeal. Subsequently, the County allowed an additional party to inspect the machines. As a result, the Secretary filed a contempt and sanctions application. In this opinion the Supreme Court found that the County willfully violated the Supreme Court's order and imposes sanctions.

Eminent Domain

In RE: Township of Robinson, 297 A.3d 460 (Pa. Cmwlth., April 24, 2023), reargument denied (June 20, 2023).** A developer purchased a parcel of real estate for development adjacent to, but without direct access to, a preferred road. The developer approached the adjoining landowner, E&R, several times regarding the concept of a shared road, without arriving at an agreement. Thereafter, an engineer for the developer recommended the Township condemning a portion of E&R Property to allow for the traffic signal and intersection.

The condemnation resolution indicated that the Township and E&R could not agree on terms of the value of the property to be condemned and Township desired to acquire the portion of E&R Property by condemnation pursuant to Section 1901 of The First Class Township Code. The Township filed a declaration of taking (Declaration) and E&J filed preliminary objections (POs) to the Declaration, asserting that the Township acted in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, the Pennsylvania Constitution, and the Property Rights Protection Act.

Trial court overruled E&R's POs citing to deposition testimony and indicated that "the testimony of the five [Township's Commissioners] clearly demonstrates that their decision was based on the advice of the various professionals who testified that the primary reasons for the taking of the property *was to improve the safety of the intersection*." (Emphasis in original.)

E&R appealed, and the Commonwealth Court determined that its role under the restrictive scope of the Protection Act, make it clear that the government lacks authority to take private property absent a public use purpose. In examining the trial court proceedings, it found that the trial court failed to establish by substantial evidence that there was a sufficient public purpose related to safety, and no one was able to articulate on the record, the safety concerns being addressed by the condemnation or what public benefit would be conferred. Thus, the primary purpose for the condemnation was to benefit the developer, which was contrary to law, and the trial court was reversed.

Government Accountability

Young v. City of Scranton, 291 A.3d 1245 (Pa. Cmwlth., March 28, 2023). Neighbors filed a complaint against the City of Scranton (City), alleging trespass, private nuisance, negligence, and violations of the Stormwater Management Act related to damages caused by a failing culvert. The trial court found in the neighbor's favor and a jury awarded damages for past, present, and future loss of enjoyment of their property, as well as annoyance and inconvenience. The City appealed the damage award on the basis that it went beyond the city's liability under the Political Subdivision Tort Claims Act (PSTCA).

The court determined that the resolution of the issue narrows down to the purpose of the PSTCA within Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes. Title 42 limits the liability of local agencies "for any damages on account of any injury to a ... property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. C.S. § 8541. Further, it limits the type of compensable losses recognized to, as relevant here, "property losses". The court concluded that because of the parties' dueling interpretations of "property loss" and the lack of clear precedent regarding the subject, the statute is ambiguous regarding that term.

The court held that "the statute simply does not, on its face, provide for the recovery of derivative damages … Thus, it is a reasonable assumption that these derivative damages were not intended by the legislature as an exception where not specifically provided." As a matter of first impression, Commonwealth Court therefore held that the trial court erred when it determined that PSTCA allowed neighbors to recover damages for loss of enjoyment of their property. The court vacated and remanded the matter for a determination as to whether a new trial on the damages was necessary.

Mezzacappa v. Northampton Cnty., 297 A.3d 446 (Pa. Cmwlth., April 6, 2023), reargument denied (May 30, 2023).** Requester submitted a Right-to-Know-Law (RTKL) request to Northampton County (County) for various records, including inmate mug shots. The County delivered most of the requested materials but declined the mug shots. Requester appealed to the Office of Open Records (OOR), which directed the County to release the mug shots. The County appealed to the trial court, which affirmed the OOR.

On appeal to Commonwealth Court in this matter of first impression, the County maintained that it is prohibited from releasing mug shots under both the Criminal History Record Information Act (CHRIA) and the RTKL. Alternatively, the County argued that the records are exempt from release under the RTKL itself. Additional issues on appeal not discussed here include the County's assertion that the trial court failed to properly consider the burdens of complying with the request and that, while it is required under the RTKL to issue a "good faith response" to Requester, the nature of the request makes that impossible.

The County first argued that mug shots are "police records," and as such, are within CHRIA's definition of criminal history record information, which may be subject to redaction of certain "identifiable descriptions" prior to release. The court disagreed, finding that the relevant definition applies to records that contain strictly information that is expressed in words or numbers. "Had the General Assembly intended the phrase to encompass mug shots or other photographic images, it would have used more precise language to that effect."

The County argued that mug shots are exempt from disclosure under the RTKL, since they are taken as a result of charges and commitment and, as a result, inherently disclose the initiation of such investigations or proceedings, and further because they would deprive a defendant of "the right to a fair trial or impartial adjudication."

The court determined that a mug shot only indicates an individual has been charged with an unspecified offense, not the contents of an investigation. Because the exemptions within the RTKL should be interpreted narrowly, it found that no exemption should apply related to investigations or impartial adjudication here. Commonwealth Court affirmed the trial court's determination that the mug shots were not exempt or prohibited from disclosure.

Land Use

Kowalczyk v. Borough of Portage, 295 A.3d 752 (Pa. Cmwlth., March 27, 2023).** Landowner initiated this action by filing a petition for declaratory judgment and to quiet title in the trial court over a portion of an alley that was never opened for over 110 years at the edge of his property.

Landowner argued that Pennsylvania law dictates that the Borough's portion of the Alley, an unopened paper street, reverted to the adjacent landowners by operation of law after the Borough failed to open or accept the Alley for more than 21 years after it was offered for dedication. The trial court granted summary judgment in Landowner's favor, and the Borough appealed, arguing that Landowner should have been required to petition the Borough under Section 1724(a) of the Borough Code as a remedy to exhaust prior to filing for quiet title.

Commonwealth Court affirmed the trial court and concluded that the Borough misconstrued Section 1724 of the Borough Code in that Section 1724 contains two different procedures for quieting title to an unopened paper street, based on the length of time that has passed since the street was first laid out. Had 10 years passed, the petition would have been required under subsection (a), but where 21 or more years have passed, the Borough needed the consent from the underlying owner before opening the street. Thus, where subsection (b) applies, a petition under subsection (a) is not *additionally* required. Further, the court found that this interpretation with the Borough Code's previous iterations before consolidation.

In Re Vacation of a Portion of Paper Mill Rd., Newtown Twp., 294 A.3d 975 (Pa. Cmwlth., April 20, 2023). Landowners petitioned Newtown Township (Township) Board of Supervisors (Supervisors) to vacate a portion of a road that traversed part of the landowner's recently acquired property pursuant to the Second Class Township Code. Supervisors

"Had the General Assembly intended the phrase to encompass mug shots or other photographic images, it would have used more precise language to that effect."

- Mezzacappa v. Northampton County

considered and unanimously denied Landowners' petition, concluding that the contested portion of the road was *not* useless, inconvenient, or burdensome.

Thereafter, Landowners filed a petition under the General Road Law for the appointment of viewers with the trial court to review their petition to vacate. The court appointed a Board of View (Board). The Board filed its report and concluded that based upon the evidence, the contested portion of the road, as to vehicular traffic was useless, inconvenient, and burdensome; but as for pedestrian and recreational traffic, the road was not useless, inconvenient, or burdensome. Despite the Board's report, and following some additional procedural history not summarized here, the trial court ultimately found that the Board's findings that costly maintenance and improvement needs should have resulted in the Board concluding that the road is useless, inconvenient, or burdensome notwithstanding its potential for recreational use.

On appeal, the Commonwealth Court found that the trial court improperly supplanted the Board as fact finder, rather than examine whether the Board's findings were supported by substantial evidence. Finding that the Board properly fulfilled its role to assess the weight and credibility of the evidence provided, Commonwealth Court found its conclusions supported by substantial evidence that the road could continue to be used in its unimproved condition for recreational purposes to the benefit of the public, and thus not be vacated.

Basinger v. Adamson, 297 A.3d 10 (Pa. Cmwlth., June 2, 2023). Property owners disagree about whether a road adjacent to their properties remained public and brought action against adjacent owners and township, seeking declaration that the road was a public road and seeking a permanent injunction to require township to maintain road and to prevent adjacent owners from restricting access. The trial court held that the road was no longer a public road. Property owners appealed.

On appeal, Commonwealth Court held that the road, over which property owners disputed ownership and use rights, was a public road. The court found that the road had been public road beginning at an unspecified point in history and there was no evidence that township in which road was located had statutory authority to vacate road prior to the Second Class Township Code of 1933. Thereafter, there was no evidence that township had ever enacted any ordinance authorizing township to vacate the road. Accordingly, the trial court erred when it held that the township had vacated the road by abandoning it.

Public Employment

Martin v. Donegal Twp., 293 A.3d 765, 773 (Pa. Cmwlth., April 13, 2023), appeal granted in part (Oct. 24, 2023). In the November 2020 general election, voters voted to reduce the composition of the board of supervisors (Board) from five to three members pursuant to the Second Class Township Code (Code). Five candidates won the Board primary election. After the November 2021 general election, and pursuant to the voter referendum that passed in 2020, only the top three candidates were elected, and effective January 3, 2022, the terms expired for the remaining two candidates (Appellants).

Appellants' complaint challenged that the two members whose terms expired above violates Article IV, Section 7 of the Pennsylvania Constitution. Trial court granted, among other things, a preliminary objection (dismissing the complaint) that the appellants failed to state a valid claim that the Second Class Township Code violates the Constitutional provision because a change in the form of government resulted in the expiration of their terms, not removal.

On appeal, Commonwealth Court rejected that a referendum reducing the number of members of the governing body constitutes a change of government and distinguishes the Second Class Township Code provision from precedents related to the creation and elimination of wards, and adoption of home rule charters that resulted in expired terms that did not violate Article IV, Section 7. Thus, the Second Class Township Code provision was unconstitutional as applied to the Appellants, and the trial court was reversed. On October 24, 2023, Pennsylvania Supreme Court has granted allowance of appeal limited to the following question:

> Whether Section 402(e) of the Second Class Township Code, 53 P.S. § 65402(e), is constitutional as applied when, pursuant to its terms, the number of township supervisors is reduced by referendum from five to three, thereby abolishing two supervisor seats?

Kleinbard LLC v. Off. of Dist. Att'y of Lancaster Cnty., 297 A.3d 461 (Pa. Cmwlth., April 25, 2023).** District Attorney (DA) Craig Stedman (Stedman) signed an engagement agreement with the private law firm, (Kleinbard), to represent him in his official capacity as Lancaster County District Attorney (DA). Shortly after Stedman engaged Kleinbard, the Commissioners announced that they would not approve payment of fees incurred by Stedman or the DA's Office resulting from the Stedman lawsuit, specifically including any fees for Kleinbard's legal services.

Thereafter, Kleinbard filed an action in the trial court in the nature of a complaint in mandamus, breach of contract unjust enrichment, and tortious interference. Lancaster County filed preliminary objections (POs). In its opinion, the trial court sustained Appellees' POs in part and ordered Appellees to pay Kleinbard $5,000 for DA legal fees because that was the amount budgeted, but dismissed the remainder of the complaint with prejudice.

On appeal, Commonwealth Court upheld the trial court, finding that Stedman could not, pursuant to Section 1773(b) of the County Code, enter into a contract that exceeded the DA's appropriation for legal fees. In doing so it rejected Kleinbard's contention that Stedman could designate unappropriated funds from other line items. Thus, if Stedman needed to exceed the legal fees appropriation he could have sought a supplemental appropriation from the Commissioners. To hold otherwise would deny the Commissioner's legislative function under the County Code.

Taxation and Finance

Chester Upland Sch. Dist. v. Delaware Cnty. Bd. of Assessment Appeals, 297 A.3d 445 (Pa. Cmwlth., April 4, 2023).** Appealing Trial Court's dismissal of its complaint seeking to bar the county board of assessment (Board) from participating in its assessment appeals, appellant School Districts contended that the trial court erroneously interpreted the Consolidated County Assessment Law (CCAL) and that its right to file an appeal from a Board decision should be construed to treat such appeal as if it were taken by the "taxable person" pursuant to Section 8854 of CCAL, with the exception that there is a statutory right to Board participation when *a taxing district* appeals pursuant to Section 8855. Commonwealth Court disagreed with the School Districts and affirmed the trial court, finding that the School Districts were incorrect in their assertion that the sections of CCAL distinguish a role for the Board. In both instances, the Board's role is to establish its prima facia basis for the assessment that the appealing party is contesting. Section 8855, concerning taxing district appeals, does not amend the manner of the appeal, merely the filing.

Legislative Updates: *(Continued from page 1)*

Acts 10 (**SB 836**) and 37 (**HB 863**) of 2023 make changes to municipal police recruiting. Act 10 requires applicants to submit fingerprints upon application to the Municipal Police Officers Education Training Commission (MPOETC). Act 37 give the MPOETC authority to set physical fitness and reading standards for new applicants.

HB 775 amends Title 53 of the PA Consolidated Statutes to allow municipalities to create and maintain a vacant property registration. The bill passed the House (177-26) and is now in the Senate Urban Affairs and Housing Committee.

HB 1062 also amends Title 53, to establish a statewide blight data collection system. The bill passed the House (118-85) and is now in the Senate Urban Affairs and Housing Committee.

** Indicates that this case is UNREPORTED.
See 210 Pa. Code § 69.414