

## **The Limits of the Police Power in Pennsylvania** (05/27/20)

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A case decided by the Pennsylvania Supreme Court September 11, 2019 may have considerable impact on questions concerning the state's response to the COVID-19 crisis. *Ladd v. Real Estate Commission*, 2020 Pa. LEXIS 2764 (Pa. S. Ct. May 20, 2020) Dougherty, J., was decided by a somewhat divided court. Justice Wecht filed a dissenting opinion along with Justice Mundy. The case involved a challenge to the real estate licensing requirements codified in the Real Estate Licensing and Registration Act, 63 P.S. §§ 455.101-455.902 (RELRA). The majority concluded that the requirements of law did not satisfy the heightened rational relation test articulated in *Gambone v. Commonwealth*, 375 Pa. 547, 101 A.2d 634 (Pa. 1954).

The RELRA set forth certain statutory licensing requirements for real estate brokers in Pennsylvania. A broker was defined in the law in expressing clear terms. "Brokers" must take an examination before becoming licensed. It is necessary to become a "salesperson" before an individual can operate as a broker. A number of other criteria are set forth in the comprehensive regulatory scheme which struck this court as being overbroad.

After examining the arguments, the majority of the Court determined that Article I, Section I of the Pennsylvania Constitution was violated. That Section provides for free and independent inherent and inalienable rights. These include the enjoyment of life and liberty, acquiring, possessing and protecting property and reputation. Further, an individual has the right to pursue their own happiness. Included within the right to possess property and pursue happiness is the right to pursue a chosen occupation.

The majority of the Court noted that a substantive due process subjects a law to a "means-and-review" test. The Court must weigh the rights infringed upon against the interest sought to be protected by it. Then the Court will scrutinize the relationship between the law (the means) and the interest (the end). The level of scrutiny is dependent upon the nature of the right allegedly infringed. When the right is fundamental, the Court will apply a strict scrutiny test. The law will be upheld only if it is narrowly tailored to achieve a compelling state interest. A right that is not fundamental is subject to a rational basis for review. The rational basis test under Pennsylvania law is less deferential to legislature than its federal counterpart.

The Court determined that the RELRA's real estate broker licensing requirements, including apprenticeship, instructional coursework and examinations are "unreasonable" and "oppressive". Those requirements do not bear a "real and substantial" relation to the public interest which is sought to be protected.

In reversing the lower court, the Pennsylvania Supreme Court recognized the government's legitimate interest in protecting consumers from fraudulent conduct. Even if the broker licensing requirements generally bear a real and substantial relationship to

protecting the public interest from fraud, the Court felt obliged to consider the specific application of the law to the challenger's actual business model. The Commonwealth Court, ruled the Court, improperly sustained a demurrer.

The Court acknowledged that the issue is one first impression. After examining the apprenticeship and coursework required, the majority expressed the view that the allegations of the complaint, if true, indicated a business model that is sustainable only with great cost and overhead considerations. A comment at the end of the opinion is quite timely.

Finally, we reiterate that the Commonwealth **police power** must be exercised in a constitutional manner, one that is not unreasonable, unduly oppressive, or patently beyond the necessities of the case, and bears a real and substantial relation to the purported policy objective.

At Slip Opinion 45, relying upon *Gambone*, 101 A.2d at 637.

The conclusion of the majority was that Ladd's allegations presented a colorable claim that the RELRA's requirements as applied to her services were unreasonable, unduly oppressive and patently beyond the necessities of the case. They did not "without a doubt" bear a real and substantial relation to the statutory goal of protecting the public from fraud.

Did the Governor's COVID-19 response banning law offices and accountants from doing business in person, while permitting bicycle stores to be open, bear a legitimate, reasonable and rational connection to the public health? Did the Governor violate the Pennsylvania Constitution, not to mention the federal, by imposing certain immunities in favor of health care providers, based upon exercise of the police power? This opinion, along with many others, questioned the scope and reach of the police power when it appears not to be reasonable. There were so many inconsistencies in the Governor's approach to COVID-19 that one must wonder aloud whether the restrictions were patently beyond the necessities of the case or bore a real and substantial relation to the purported policy objective.

While we have not fully explored the legitimacy of many of the Governor's pronouncements, decisions and immunities granted, there certainly will be, at one time or another, a serious examination as to whether the police powers exercised by the government through the Governor were excessive or unconstitutional.

*Clifford A. Rieders, Esquire*  
*Rieders, Travis, Humphrey,*  
*Waters & Dohrmann*  
*161 West Third Street*  
*Williamsport, PA 17701*  
*(570) 323-8711 (telephone)*

*(570) 323-4192 (facsimile)*

*Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.*